2005

Nevin Pratt, Denise Pratt v. Mary Ann Nelson : Brief of Appellant

Utah Court of Appeals

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F. Mark Hansen; Carl E. Kingston; Attorneys for Appellants.

IN THE UTAH SUPREME COURT

NEVIN PRATT; DENISE PRATT, Plaintiffs, vs. MARY ANN NELSON *ET AL.*, Defendants.	Appellate Case No. ~~2004-0752~~ 20051167-SC Priority No. 15

BRIEF OF APPELLANTS

APPEAL FROM OPINION OF THE COURT OF APPEALS, AFFIRMING FINAL ORDERS AND JUDGMENT BY THE HONORABLE MICHAEL G. ALLPHIN, SECOND DISTRICT COURT, DAVIS COUNTY

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ORAL ARGUMENT REQUESTED

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JURISDICTION

This Court has jurisdiction pursuant to Utah Code Ann. §78-2-2(3) (2001).

STATEMENT OF ISSUES

ISSUE 1: Whether the Court of Appeals erred in affirming the trial court's dismissal of the Pratt's Amended Complaint based on the judicial proceeding privilege.

Standard of Review: "Under rule 12 of the Utah Rules of Civil Procedure, a motion to dismiss is proper 'only where it clearly appears that the plaintiff or plaintiffs would not be entitled to relief under the facts alleged or under any state of facts they could prove to support their claim.' ... 'Because we consider only the legal sufficiency of the complaint, we grant the trial court's ruling no deference and review it for correctness.' " Bennett v. Jones, Waldo, Holbrook & McDonough, 2003 UT 9 ¶30, 70 P.3d 17 (citations omitted). To the extent Defendants' Rule 12(b)(6) motion was converted one for summary judgment by offering the document they published at their press conference, "In reviewing a trial court's grant of summary judgment, we give no deference to its conclusions of law. Instead, we review the grant of summary judgment for correctness. ... '[W]e review the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party.' " Dick Simon Trucking, Inc. v. Utah State Tax Com'n, 2004 UT 11 ¶3, 84 P.3d 1197.

Preservation of Issue: R. 25-27, 34-47, 48-57, 62-138, 142-151.

ISSUE 2: Whether the Court of Appeals erred in affirming the trial court's dismissal of the Pratt's Amended Complaint based on the group defamation rule.

Standard of Review: Same as for Issue 1.

Preservation of Issue: R. 207-214, 225-226, 227-228, 229-233.

DETERMINATIVE RULES

Utah R. Civ. Proc. 56(c): "The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

STATEMENT OF THE CASE

1. Nature of The Case.

This appeal is before the Utah Supreme Court on certiori from a December 15, 2005 Opinion of the Utah Court of Appeals, affirming a final order by the Honorable Michael G. Allphin, Second District Court, Davis County entered on August 17, 2004.

On August 1, 2003, Defendant Mary Ann Roe [1] assisted by her attorneys White, Morris, Mark, and McKay, Burton & Thurman, filed a Complaint in Third District Court against David O. Kingston and Daniel Kingston for various alleged batteries and other torts. They also named some 242 other individual defendants including the Pratts, alleging infliction of emotional distress, civil conspiracy, and other torts, falsely claiming the Pratts had assisted, encouraged, or knew of and failed to prevent or report the alleged torts of David and Daniel Kingston. The Complaint was assigned to the Honorable William W. Barrett and is hereafter referred to as the Barrett Complaint.

On August 28, 2003, Defendants held a press conference at which they distributed copies of the Barrett Complaint to the press media, and also published verbal statements stating that the defendants including the Pratts had done things to injure Roe.

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[1] She is married. The Pratts have learned her married name is Mary Ann Nichols.

The Pratts then filed this action, alleging among other things that Defendants' publications at the press conference and the resulting publicity defamed them.

On Defendants' motion to dismiss, converted to one for summary judgment when Defendants submitted the Barrett Complaint with their Reply Memorandum, the Trial Court held that Defendants' republication at the press conference of Roe's Complaint was protected by the judicial proceeding privilege, and that as a matter of law no reasonable juror could find any of Defendants' publications could be construed to refer to the Pratts. The Pratts appealed to the Court of Appeals, which among other things held (a) it was precluded by the invited error doctrine from reversing the trial court on the judicial proceeding privilege, and (b) without looking at the Complaint against the Pratts, Defendants' publications were not defamatory under the group defamation rule. The Pratts petitioned this Court for certiorari, which the Court granted on the issues discussed herein.

2. Course of Proceedings and Disposition at Trial Court.

02/11/04 The Pratts filed their Complaint. [R. 1-12]

03/04/04 Defendants filed their Motion to Dismiss. [R. 25-27]

03/15/04 The Pratts filed their Memorandum in Opposition to Motion to Dismiss. [R. 48-58]

03/24/04 Defendants filed their Reply Memorandum in Support of Motion to Dismiss. [R. 142-151]

05/07/04 The Trial Court issued an Order stating Defendants' Reply Memorandum raised for the first time a judicial privilege argument, and allowing the Pratts eight days to respond solely to that argument. [R. 198-199]

06/17/04 The Pratts filed their Reply Memorandum in Opposition to Defendants' Motion to Dismiss Based on Judicial Privilege. [R. 229-233]

06/23/04 Defendants filed Their Request to Submit for Decision on their Motion to Dismiss, which by their Reply Memorandum had been converted to one for summary judgment. [R. 215-218]

06/23/04 Defendants filed a Motion to Strike Plaintiff's Reply Memorandum in Opposition to Motion to Dismiss Complaint Based on Judicial Privilege. [R. 212-214]

07/16/04 The Pratts filed their Memorandum in Opposition to Defendants' Motion to Strike the Pratts' Reply Memorandum. [R. 227-228]

Defendants did not file a Reply Memorandum in support of their Motion to Strike. [Record generally]

Defendants' Motion to Strike was not submitted for decision. [Record generally]

07/16/04 The Pratts filed a Motion to Strike "Judicial Privilege" Argument in Defendants' Reply Memorandum in Support of Motion to Dismiss. [R. 225-226]

Plaintiffs did not oppose the Pratts' Motion to Strike "Judicial Privilege" Argument. [Record generally]

08/17/04 The Trial Court entered its Ruling on all pending motions. [R. 234-251]

09/01/04 The Pratts filed their Notice of Appeal. [R. 252-253]

01/0305 The Pratts filed their Brief of Appellants with the Court of Appeals.

02/0705 Defendants filed their Brief of Appellees with the Court of Appeals.

03/14/05 The Pratts filed their Reply Brief of Appellants with the Court of Appeals.

12/15/05 The Court of Appeals issued its Opinion for official publication.

12/28/05 The Pratts filed their Petition for Certiorari to the Utah Supreme Court.

01/25/06 Defendants filed their Brief in Opposition to Petition for Certiorari.

03/27/06 The Supreme Court granted the Pratt's Petition for Writ of Certiorari as to the issues addressed in this Brief.

STATEMENT OF RELEVANT FACTS

Based on the standard for review *supra*, the following facts apply to this appeal.

1. On August 1, 2003, Defendant Mary Ann Roe (no known to be Mary Ann Nichols, *see* footnote 1 *supra*) through her attorneys, John Dustin Morris and William A. Mark of the law firm of McKay, Burton & Thurman, and Douglas F. White, filed a lawsuit in Third District Court, Civil No. 030917113PI, assigned to the Honorable William W. Barrett (the Barrett Complaint). [R63, 67-136]

2 The caption of the Barrett Complaint identifies Nevin and Denise Pratt by name. [R 73].

3. The body of the Barrett Complaint identifies Nevin Pratt and Denise Pratt by name, [R. 89], and defines "Order Members" specifically to mean Nevin and Denise Pratt among others. [R. 84-85] Every subsequent reference in the Barrett Complaint to "Order Members" therefor refers to Nevin Pratt and Denise Pratt.

4. The Barrett Complaint identified Nevin Pratt and Denise Pratt by name as members of the Davis County Cooperative Society, Inc. (the cooperative, to whom Defendants referred as "the Co-op," "the Order," and "the Kingston organization"), against whom Defendants' at the press conference were directed. [R. 185 ¶ 16]

5. Each of the statements in the Barrett Complaint about Nevin Pratt and Denise Pratt as "Order Members" was false. [R 6 ¶ 25, 184 ¶ 15, 186 ¶ 19] The false statements in the Barrett Complaint about Nevin Pratt and Denise Pratt as "Order Members" include the following [R 183-184 ¶ 14] :

a. The Pratts, as "Order Members," planned, assisted, encouraged, allowed, aided and abetted in, or otherwise knew of, and in violation of a legal duty to do so, failed to act to prevent or to report to authorities a polygamous and incestuous marriage of Roe to Roe's uncle.

b. The Pratts, as "Order Members," knew Roe's uncle would perpetrate acts of sexual abuse against Roe and did nothing to stop it despite a legal duty to do so.

c. The Pratts, as "Order Members," encouraged, allowed, participated in, failed to report, or otherwise assisted Roe's uncle to commit four separate acts of sexual abuse of Roe.

d. The Pratts, as "Order Members," encouraged, allowed, participated in, failed to report, or otherwise assisted Roe's father to viciously whip Roe across her back and legs, and to beat Roe's face and arms.

e. The Pratts, as "Order Members," intended to cause Roe emotional distress.

f. The Pratts, as "Order Members," acted with the purpose of causing, or in reckless disregard of the likelihood of causing, emotional distress to Roe.

g. The Pratts, as "Order Members," knew or should have realized the Pratts engaged in conduct that involved an unreasonable risk of causing emotional distress to Roe.

h. From facts known to the Pratts as "Order Members," they should have realized if they caused Roe emotional distress it might cause Roe illness or bodily harm.

I. The conduct of the Pratts, as "Order Members," caused Roe emotional distress resulting in illness or bodily harm.

j. The Pratts, as "Order Members," were part of a conspiracy (I) to force Roe into an illegal, incestuous, polygamous marriage to her uncle, (ii) to subject Roe to sexual abuse at the hand of Roe's uncle, and (iii) to subject Roe to physical abuse at the hand of Roe's father.

k. The Pratts, as "Order Members," were partners in a general partnership with Roe's uncle, and that Roe was forced into an illegal, incestuous, polygamous marriage with Roe's uncle, and that Roe's uncle committed four separate acts of sexual abuse of Roe, all in the ordinary course of the business of the alleged partnership between

the Pratts and Roe's uncle, or with the Pratts' authority, knowledge, consent, or ratification as the uncle's business partners.

l. The Pratts, as "Order Members," were partners in a general partnership with Roe's father, and that Roe's father savagely beat Roe in the ordinary course of the business of the alleged partnership, or with the Pratts' authority, knowledge, consent, or ratification as the father's business partners.

m. Both Roe's uncle and Roes' father were agents of the Pratts as "Order Members," and that the acts of Roe's uncle and father as stated above were of the general kind and nature that the Pratts hired, directed, encouraged, consented, engaged, or ratified them to perform, and that the acts of Roe's uncle and father as stated above occurred within the ordinary scope and boundaries of their employment, direction, encouragement, consent, engagement, or ratification, and were motivated by the purpose of serving the Pratts' interest.

n. The Pratts, as "Order Members," committed their acts or omissions as the result of willful and malicious conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, the rights of Roe.

o. The Pratts, as "Order Members," caused Roe at least $10 million in damages.

6. On August 28, 2003, Mary Ann and her attorneys John Morris, Douglas White, and William Mark were present at a press conference at the offices of McKay, Burton, & Thurman, where at least the first three named made verbal statements to the press. [R. 2 ¶ 12, 63, 183 ¶ 12]

7. Besides inviting local Utah news media, Defendants invited the Associated Press (AP), knowing the AP distributed news releases nationwide to thousands of media subscribers, with the intent and purpose to have Defendants' publications distributed at least nationally including within Utah and the surrounding states. [R. 2 ¶ 13, 183 ¶ 13]

8. At the press conference, two documents were provided to members of the press, one of which was the Barrett Complaint. As a result, Roe, Morris, Mark, and White were responsible for the publication of the Barrett Complaint and its contents to the press. [R. 63, 67-136, R. 183 ¶ 14]

9. At the press conference, Mary Ann read the following statement, a written copy of which was also provided to the press conference attendees:

> My name is Mary Ann and I was raised in the Kingston Polygamist Family. I escaped when I was 16 years old. I am pursuing this lawsuit with the hope that other young girls and boys in the same position that I was in will see that the leaders of the Kingston organization are not above the law, even though they tell us that they are, that the can be punished for what they do to us and that we can escape and seek recovery for the harm that was done to us. I also hope that the people that we are bringing this lawsuit against will realize the harm they have caused and continue to cause, and that they will change their ways.

[R. 64, 138, 186]

10. One of the news reports of the press conference stated: [R. 185 ¶ 18(b)]

> A former underage "wife" who was severely beaten after trying to escape the polygamous Kingston clan has struck back with a $110 million civil lawsuit against 242 family members and 97 businesses. Mary Ann Kingston, now 22, has sued 242 specifically identified members of "the Kingston family" and targeted assets of family-owned firms.
> Her lawyers contend these [specifically identified 242 individuals including the Pratts] either directly contributed to physical and sexual abuse Roe suffered a few years ago or knew of the situation and did noting to prevent or report it.
> "She hopes to see civil justice punish the people who harmed her," said attorney Douglas White He added that Mary Ann Kingston also wanted to see an end to the "psychological, emotional and sexual exploitation of young girls" that she maintains permeates the philosophy of the [cooperative] ..."

11. Morris told the media, "there are plenty of others who knew about this ... This is an attempt to punish the entire family ..." [R. 186 ¶ 18©]

12. William Mark told the media the individuals identified by name in the Barrett Complaint, which included the Pratts by name, are "the key members of the Kingston organization," and that Defendants were trying to "punish" them and "make an example of them." [R. 186 ¶ 18(d)]

13. Defendants intended that the media would inform the general public that the Barrett Complaint was a public record, making the general public, who would otherwise

have been ignorant of the document, aware of its ready availability. The media so informed the general public as Defendants intended. [R. 186 ¶ 20]

14. Defendants wilfully, purposefully, and intentionally caused their publications to be distributed both in print and orally in a media market as broad as possible, and in furtherance thereof succeeded in having their publications distributed in scores of media, making Defendants' publications national and international in scope. [R. 187-189]

15. Some of the internet republications are available on-line to this day, making the republications continuous and ongoing. [R. 189 ¶ 24]

16. Defendants' press conference was the intended, direct and proximate cause of the media distributing their publications. As a result, Defendants caused and encouraged their publications to be distributed to scores of news sources and millions of persons, with a conscious purpose and goal to inflict injury on the Pratts, or in reckless disregard of the consequences of their actions to the Pratts. [¶ 25]

17. Defendants intended that each recipient of Defendants' publications would conclude from those publications that the persons against whom the publications were directed, specifically including the Pratts, consider themselves above the law, promoted sexual, physical, and emotional abuse of Roe. Each recipient was reasonably likely to reach the conclusions intended by Defendants. [R. 189 ¶ 26]

18. Defendants' publications were made in a gratuitous press conference or in other times and places to persons having no connection to any judicial proceeding, extended beyond those who had a legally justified reason for receiving the publications, were published to more persons than the scope of the judicial privilege requires to effectuate its purpose, were published to more persons than necessary to resolve any legal dispute or further the objectives of any pending or proposed litigation, were published to persons who did not have a legitimate role in resolving any dispute, and were published

to persons who did not have an adequate legal interest in the outcome of any pending or proposed litigation. [R. 189 ¶ 28]

19. The defendants' publications alleged criminal conduct on the part of the Pratts, and/or imputed to the Pratts conduct which is incongruous with the exercise of a lawful business, trade, profession, or office. [R. 190 ¶ 29]

20. Defendants' publications as to the Pratts were false and with malice. [R. 190 ¶ 30]

21. As a direct and proximate result of the foregoing, the Pratts have suffered injury including but not limited to damage to reputation and emotional suffering and distress. The Pratts' injuries are continuing and ongoing. [R. 190 ¶ 32]

22. Defendants intentionally or recklessly intruded on the Pratts' seclusion, solitude, and private affairs in a manner which would be highly offensive to a reasonable person, and caused publicity without privilege, despite the lack of a legitimate public concern with the matters disclosed, through disclosure of private facts considered highly offensive to a reasonable person, which placed the Pratts in a false light in the public eye, subjecting the Pratts to opprobrium, contempt, reproach, embarrassment, and emotional distress. [R. 190-191 ¶ 36]

23. Defendants collectively comprise a combination of two or more persons, which operated with a meeting of minds to accomplish the unlawful objects alleged in the Pratts' Amended Complaint. [R. 191 ¶ 42]

24. One or more of Defendants committed overt acts directed against the Pratts in furtherance of the combination and conspiracy, resulting in injury to the Pratts. [R. 191 ¶ 43]

25. The Pratts incorporate by reference II the "Course of Proceedings and Disposition at Trial Court," *supra*.

SUMMARY OF ARGUMENTS

Defendants caused a Complaint to be filed that contained matters defaming the Pratts. A month later, Defendants held a press conference attended by the news media where Defendants distributed copies of their Complaint and made verbal statements defamatory of the defendants named in the Complaint. The media then publicized matters Defendants published to them at the press conference. While the filing of the Complaint was privileged, Defendants' distribution of the Complaint was not. Defendants forfeited the judicial proceeding privilege by excessive publication of the complaint outside the judicial arena to persons having no connection with the legal proceeding.

The Pratts sued Defendants for defamation among other claims. The Defendants moved to dismiss the Pratts' lawsuit. The trial court granted the motion to dismiss by an erroneously holding the judicial proceeding privilege applied to Defendants' distribution of the Complaint at the press conference. The Court of Appeals affirmed by erroneously invoking the invited error rule. First, The Court of Appeals erred by raising that issue *sua sponte*. Second, the Pratts did not mislead the trial court to preserve a hidden ground for reversal on appeal. They asked the trial court to address their legal arguments on the judicial proceeding privilege. They opposed Defendants' motion to strike the Pratts' arguments. The trial court had the opportunity to address the Pratts' judicial proceeding privilege arguments but consciously chose not to. That was not invited error.

The trial court held, and the Court of Appeals erroneously affirmed, that Defendants' verbal defamations at the press conference, which did not expressly refer to the Pratts by name, as a matter of law could be found by any reasonable person to refer to the Pratts without looking at the Complaint, and impliedly ruled the Complaint, because privileged, could not be used to show Defendants' defamations referred to the Pratts, so that the "group defamation" rule barred the Pratts' defamation action.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S DISMISSAL BASED ON THE JUDICIAL PROCEEDING PRIVILEGE.

Defendants brought a Rule 12(b)(6) motion to dismiss, which was converted at least in part to one for summary judgment when with Defendants' reply memorandum they offered the Barrett Complaint. Applying the standard for review, *see* page 1 *supra*, the trial court erred in dismissing the Pratts' Complaint in this action, and the Court of Appeals erred in affirming that dismissal based on the judicial proceeding privilege.

A. Defendants Lost any Judicial Proceeding Privilege Through Excessive Publication of the Barrett Complaint.

Defendants held a gratuitous press conference, at which they distributed to the attending news media copies of the Barrett Complaint, then made verbal statements relating to that litigation. [2] Publications at a press conference, even of matters otherwise privileged, are not protected by the judicial proceeding privilege.

No Utah case has extended the judicial proceeding privilege to statements in a gratuitous press conference, or indeed to defamations made out of court in *any* context to persons with no connection to a judicial proceeding. Utah law is to the contrary. "The

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[2] The Pratts did not have a transcript of the press conference when preparing their Complaint or their memorandum in opposition to Defendants' motion to dismiss. However, paragraph 17 of their Amended Complaint alleges, "In the press conference, in addition to distributing the document libeling the Pratts, Defendants slandered the Pratts by verbally stating to the media that specific persons including the Pratts had engaged in and/or promoted criminal conduct directed against Roe personally, and that through such criminal conduct the Pratts had injured Roe, and that the same specific persons including the Pratts considered themselves above the law, and had engaged in conduct toward Roe so egregious that they should be liable to her for over $110 million." Paragraph 27 alleges, "On information and belief, at other times and places Defendants, and one or more of the Doe defendants, have published other defamatory communications regarding the Pratts as will be shown through discovery."

class of occasions where the publication of defamatory matter is absolutely privileged is confined within narrow limits to cases in which the public service or the administration of justice requires complete immunity to account for language used." Allen v. Ortez, 802 P.2d 1307, 1311 *fn.*7 (Utah 1990). Defamation in a press conference is not within those narrow limits. Neither public service, the administration of justice, nor the public policy grounds for the "judicial proceeding" privilege, are served by immunizing tortfeasors to defame others in a press conference wholly outside the judicial arena.

Krouse v. Bower, 2001 UT 28 ¶ 15, 20 P.3d 895 outlined the "excessive publication" limit on the "judicial proceeding" privilege:

> ... the judicial proceeding privilege may be lost due to excessive publication. *See, e.g., DeBry*, 1999 UT 111 at ¶¶ 21-24, 992 P.2d 979. Statements that are otherwise privileged lose their privilege if they are excessively published, that is, "published to more persons than the scope of the privilege requires to effectuate its purpose." *Id.* at ¶ 21 (*citing Brehany v. Nordstrom*, 812 P.2d 49, 58 (Utah 1991) (stating that a privilege may be abused through publication to persons "beyond those who ha[ve] a legally justified reason for receiving it")). ... The excessive publication rule, in the context of judicial proceeding privilege cases, is to prevent abuse of the privilege by publication of defamatory statements to persons who have no connection to the judicial proceeding. *DeBry*, 1999 UT 111 at ¶ 21, 992 P.2d 979. Therefore, ... the [publication] would be excessively published if it was published to more persons than necessary to resolve the dispute or further the objectives of the proposed litigation, in other words, if the letter was published to those who did not have a legitimate role in resolving the dispute, or if it was published to persons who did not have an adequate legal interest in the outcome of the proposed litigation.

Defendants' publications to the media at Defendants' press conference was a publication to more persons than the scope of the privilege requires to effectuate its purpose. It was a publication beyond those who have a legally justified reason for receiving it. It was to persons who have no connection to the judicial proceeding. It was to more persons than necessary to resolve the dispute. It was to more persons than necessary to further the objectives of the litigation. It was to those who did not have a legitimate role in resolving the dispute. It was to persons who did not have an adequate

legal interest in the outcome of the proposed litigation. Under Krouse, every publication at the press conference was not privileged.

It is the general rule that an attorney's publications to the press are not privileged. Keeton, et al., Prosser & Keeton on Torts § 114, 820 (5th ed 1984) ("[S]tatements given to the newspapers concerning the case are not part of a judicial proceeding, and are not absolutely privileged"); Prosser, Law of Torts § 114 (4th ed. 1971) ("It is clear ... that statements given to the newspapers concerning the case are no part of a judicial proceeding, and are not absolutely privileged.").

The United States Supreme Court agrees with Krouse v. Bower and the general rule. In Buckley v. Fitzsimmons, 509 U.S. 259 (1993), during a pending criminal action the prosecuting attorney held a press conference to publicize the case, and defamed Buckley to the attendees. The charges were dropped, and Buckley sued Fitzsimmons. The United States Supreme Court flatly rejected Fitzsimmon's argument that his publications at the press conference were privileged:

> Fitzsimmons' statements to the media are not entitled to absolute immunity ... Indeed, while prosecutors, like all attorneys, were entitled to absolute immunity from defamation liability for statements made during the course of judicial proceedings and relevant to them, most statements made out of court received only good faith immunity. The common law rule was that "[t]he speech of a counsel is privileged by the occasion on which it is spoken ..."
>
> Comments to the media have no functional tie to the judicial process just because they are made by a prosecutor. At the press conference, Fitzsimmons did not act in "'his role as advocate for the State.'" The conduct of a press conference does not involve the initiation of a prosecution, the presentation of the state's case in court, or actions preparatory for these functions. ...

Id. at277 (emphasis added). The Buckley further observed (at *fn.* 8, citations omitted):

> "[Absolute immunity] does not apply to or include ... any publication of defamatory matter to any person other than those to whom, or in any place other than that in which, such publication is required or authorized by law to be made for the proper conduct of the judicial proceedings."

Buckley holds that publications at a press conference about a pending judicial proceeding are not made "during the course of judicial proceedings," and are not subject to a judicial proceeding privilege. Defendants' press conference had no functional tie to the judicial process. Buckley supports this Court's holding in Allen that the judicial proceeding privilege is "confined within narrow limits to cases in which the public service or the administration of justice requires complete immunity." It is in accord with this Court's holding in Krouse that any privilege is lost if an attorney publishes "to more persons than the scope of the privilege requires to effectuate its purpose."

Green Acres Trust v. London, 688 P.2d 617 (Ariz. 1984) provides a well reasoned analysis of the excessive publication rule, London and other attorneys met to review a draft of a complaint. One of the lawyers invited a reporter and gave him a copy of the draft complaint. The reporter then wrote an article reporting on the grounds for the suit. Green Acres sued the attorneys for defamation. The trial court granted the attorneys summary judgment based on the judicial proceeding privilege. The Arizona Supreme Court reversed, Id. at 622-623, holding the privilege did not apply:

> [O]ther authorities have considered the "press conference" context and decided against the application of the privilege to communications made in that setting. [citations omitted] These authorities generally conclude that since publication to the news media lacks a sufficient relationship to judicial proceedings, it should not be protected by an absolute privilege. *See Asay v. Hallmark Cards, Inc., supra*, 594 F.2d at 697. ...
> *Asay* concluded that the application of the absolute privilege defense was dependent upon an analysis of the occasion for the communication and the substance of the communication. *Id.* 594 F.2d at 697. Focusing on the occasion of the statements, the *Asay* court concluded that since "[p]ublication to the news media is not ordinarily sufficiently related to a judicial proceeding to constitute a privileged occasion," the absolute privilege should not immunize such publication to the media. *Id.* The court found that this conclusion harmonized with the public policy underlying the privilege:
>
> > The salutary policy of allowing freedom of communication in judicial proceedings does not warrant or countenance the dissemination and distribution of defamatory accusations outside of the judicial proceeding. No public purpose is served by allowing a person to unqualifiedly make libelous or defamatory statements about another, but rather such person

> should be called upon to prove the correctness of his allegations or respond in damages.
>
> *Id.* at 698. We conclude that the *Asay* ruling represents the better position considering the competing interests to be protected. We believe that both content and manner of extra-judicial communications must bear "some relation to the proceeding." The requirements of *Asay* that the recipient of the extra-judicial communication have some relationship to the proposed or pending judicial proceeding for the occasion to be privileged is sound. [citations omitted]
>
> In this case, the recipient of the communications, the newspaper reporter, had no relation to the proposed class action. The reporter played no role in the actual litigation other than that of a concerned observer. Since the reporter lacked a sufficient connection to the proposed proceedings, public policy would be ill served if we immunized the communications made to the reporter by the lawyer defendants. The press conference simply did not enhance the judicial function and no privileged occasion arose. Accordingly, the lawyer defendants were not absolutely privileged to publish the oral and written communications to the newspaper reporter.

See Kennedy v. Zimmermann, 601 N.W.2d 61, 65-66 (Iowa 1999), (attorney interviews with news reporters, including the republication of statements made in an otherwise privileged court paper, are not privileged: "We recognize statements contained in a petition to a lawsuit are absolutely privileged. However, republication outside a judicial proceeding of protected communications previously made in a judicial proceeding is not privileged."); Barto v. Felix, 378 A.2d 927, 230 (Penn. 1977), *quoting* Doe v. McMillan, 412 U.S. 306, 314 *n.* 8 (1973) ("The republication of a libel, in circumstances where the initial publication is privileged, is generally unprotected.").

The press did not discover the Barrett Complaint on their own. Defendants provided it to them, and in doing so stripped the Barrett Complaint of any judicial proceeding privilege or other privilege. The media's reporting of the lawsuit is subject to a more limited "fair reporting" privilege. Even that privilege is not available to Defendants. *See* Restatement (Second) of *Torts* § 611, comment c: "A person cannot confer this privilege [a more limited "fair report" privilege] upon himself by making the original defamatory publication himself and then reporting to other people what he had

stated. This is true whether the original publication was privileged or not." In Williams v. Williams, 298 N.Y.S.2d 473 (N.Y. 1969), the defendants sued the plaintiff for civil conspiracy, then publicly circulated copies of the complaint. When sued in return for republishing the contents of their complaint, the defendants asserted a "fair report" privilege. The court denied their motion to dismiss, holding the "fair report" privilege does not permit a person to file a defamatory pleading, republish it to persons not involved in the court proceeding, and then escape liability by invoking the privilege.

The Barrett Complaint was filed on August 1, 2003. Defendants held their press conference on August 28, 2003. There is no evidence any member of the media ever obtained a copy of the Complaint from any place other than from Defendants at the press conference. It is a reasonable inference from the facts of this case, which this court must accept as true, that but for Defendants' affirmative acts, the news media would not have discovered Mary Ann's Complaint, that there would have been no publication of any statement by Defendants outside the walls of the Matheson Courthouse, and that any harm to the Pratts was directly and proximately caused by Defendants' press conference.

If Defendants had their way, anyone wanting to commit defamation with impunity could simply incorporate his defamations in a Complaint, file it with a court, and republish to his heart's content. The law simply does not immunize tortfeasors from liability to incorporate defamations in a court pleading, call a press conference to self-republish their defamations outside the privileged judicial arena to persons unconnected to any court proceeding, and then claim a judicial proceeding privilege (or any other privilege) for their extra-judicial publications. Defendants' statements to the press were excessive publications outside the judicial arena, to persons not involved in the judicial proceeding, and were not privileged. This is not to say Defendants cannot hold a press conference. But if they do, they publish at their own risk, and have no judicial proceeding immunity for any excessive publications.

The Trial Court committed reversible error by holding the judicial proceeding privilege immunized Defendants from tort liability for distributing the Barrett Complaint at their press conference. The Court of Appeals concluded at 2005 UT App 541 ¶15, "Given what was before the [trial] court, this ruling [applying the judicial proceeding privilege] appears to be entirely correct." That statement was reversible error. The trial court was obligated to take as true all factual allegations of the Pratt's Amended Complaint not specifically contradicted by matters Defendants offered outside the pleadings. The Amended Complaint alleges Defendants' publications were to members of the news media at a press conference, and (a) were not made during or in the course of a judicial proceeding; (b) were not confined within narrow limits to cases in which the public service or the administration of justice requires immunity; © were made in a gratuitous press conference to persons having no connection to any judicial proceeding; (d) extended beyond those who had a legally justified reason for receiving the publications; (e) were published to more persons than the scope of the judicial proceeding privilege requires to effectuate its purpose; (f) were published to more persons than necessary to resolve any legal dispute or further the objectives of any pending or proposed litigation; (g) were published to persons who did not have a legitimate role in resolving any dispute; and (h) were published to persons who did not have an adequate legal interest in the outcome of any pending or proposed litigation. See also Facts Nos. 5 and 8 *supra*. Next, the law that Defendants themselves presented to the trial court included Beezley v. Hansen, 286 P.2d 1057, 1058 (UT 1955) [R146]:

> An attorney at law is absolutely privileged to publish false and defamatory matter of another ... during the course and as part of a judicial proceeding in which he participates as counsel, if it has some relation thereto.

Based on the facts before the trial court, Defendants' publications were not during the course and as part of a judicial proceeding in which they participated as counsel.

Defendants next referred the trial court to Price v. Armour, 949 P.2d 1251, 1256 (UT 1997). That citation states:

> Three elements must be satisfied for allegedly defamatory statements to qualify for an absolute privilege: (1) The statement must have been made during or in the course of a judicial proceeding; (2) the statement must have some reference to the subject matter of the proceeding; and (3) the statement must have been made by someone acting in the capacity of judge, juror, witness, litigant, or counsel.

Applying the standard of review, *supra*, neither the Trial Court nor the Court of Appeals could correctly conclude as a matter of law that Defendants' publications at their press conference, including their republication of the Barrett Complaint were made during or in the course of a judicial proceeding by someone acting in the capacity of witness, litigant or counsel.

Defendants next referred the trial court to Allen v. Ortez, 802 P.2d 1307, 1311 (UT 1990). That citation states at footnote 7 (*quoting* Pulliam v. Bond, 406 S.W. 2d 635, 640 (Mo.1966) (*quoting* 53 C.J.S. Libel & Slander § 102 (currently § 69 (1987))):

> The class of occasions where the publication of defamatory matter is absolutely privileged is confined within narrow limits to cases in which the public service or the administration of justice requires complete immunity to account for language used.

Again applying the standard of review for this action, the facts and inferences construed in favor of the Pratts did not permit either the Trial Court or the Court of Appeals to conclude Defendants' press conference fell "within narrow limits to cases in which the public service or the administration of justice requires complete immunity."

Beezley was not authority for granting Defendants a dismissal as a matter of law. Beezley held an attorney's statements to his client in the course of litigation, relating to the matter in litigation, were privileged, but also recognized "the conduct of the litigation includes the examination and cross-examination of witnesses, comments upon the evidence and arguments both oral and written upon the evidence, whether made to the court or jury." Id. Defendants' press conference included none of those things. In Price, the

allegedly defamatory statements were made in connection with a pending National Labor Relations Board proceedings, referred to the NLRB case, and dealt with a proposed settlement of the case. Here, Defendants' publications were made in a forum unrelated to their legal proceeding. In Allen, a divorced mother filed a petition to modify her custody and visitation rights. At the request of the father, a clinical social worker who had examined the child sent a letter to the domestic relations commissioner before whom the petition was pending, stating the mother and stepfather had abused the child. The trial court dismissed a resulting defamation suit by the mother based on the judicial proceeding privilege. This Court reversed, holding as a matter of law that the social worker, while a potential witness in the custody proceeding, was not acting as a witness when she sent the letter, and therefore the privilege did not apply. Applying Defendants' own legal authorities to the facts of this case, the publications of which the Pratts complain were not made "during the course and as part of a judicial proceeding." They were made at a gratuitous press conference having no relation to a judicial proceeding. Also, while Defendants were a litigant and counsel in pending litigation, they were not acting in those capacities at the specific time when they were making their publications at the press conference. Even without the Pratts' supplemental memorandum on the judicial proceeding privilege, the Court of Appeal's conclusion is incorrect based on the facts and law before the trial court.

Defendants argue the news media has "a connection to the case" in that the media is involved in publishing stories that are newsworthy, and that Mary Ann's case was newsworthy. Defendants cite no authority for their contention, because there is none. Allen, one of the very cases Defendants argued to the trial court, is to the contrary.

A newsworthy story does not make an attorney's active participation in spreading lies to the press privileged. The scope of a judicial proceeding privilege is not determined by whether a publication is newsworthy. The privilege does not apply to publications

made to persons who are not necessary to resolve the dispute or who lack a legal interest in the outcome of the litigation. Krouse at ¶ 15. A newsworthy story does not make the press necessary to resolve a lawsuit. A newsworthy story does not give the press a legal interest in the outcome of a lawsuit between private parties. No matter how newsworthy a story, the news media are not necessary to resolve private lawsuits and have no legal interest in the outcome of private lawsuits. An attorney's statement is "privileged by the occasion on which it is spoken," and is not privileged if made to "any person other than those to whom, or in any place other than that in which, such publication is required or authorized by law to be made for the proper conduct of the judicial proceedings." Buckley at 277 and *fn* 8. The news media are not persons to whom publications are required or authorized for the proper conduct of a judicial proceeding.

Defendants' publication of the Barrett Complaint was an excessive publication that under controlling Utah law stripped it of any judicial proceeding privilege. The trial court erred by applying the judicial proceeding privilege. The Court of Appeals erred by refusing to reverse that decision.

B. The Appellate Court Erred in applying the "Invited Error Doctrine *Sua Sponte*.

In State v. King, 2006 UT 3 ¶20 *fn* 2, 131 P.3d 202 (citations omitted) this Court applied the rule it adopted in State v. Casey, 2003 UT 55, 82 P.3d 1106, that the appellate courts of this State will not apply the invited error doctrine *sua sponte*:

> Although we recognize that King affirmatively represented to the trial court that he did not have an objection to the two jurors he now challenges on appeal, thereby implicating the invited error doctrine, we decline to apply that doctrine in this case because the State failed to raise it in its brief. *See State v. Casey*, 2003 UT 55, ¶ 39 n. 10, 82 P.3d 1106 (noting that while the invited error doctrine "may preclude application of the plain error analysis," the court will refuse to consider it when "neither party raised this question below or in their briefs or at oral argument") ...

State v. Casey was controlling precedent when the Court of Appeals entered its decision in this case. The parties to this action did not invoke the invited error doctrine before the trial court, and did not raise the question in their briefs or oral argument before the Court of Appeals. The first, and only time, the issue was raised was in the Court of Appeals' Opinion. [Record generally]. Under the rule stated in State v. King and State v. Casey, the Court of Appeals erred in applying the invited error doctrine *sua sponte*.

C. The Pratts Did Not Invite Error.

The invited error doctrine is a rule of limited applicability. Normally, "in order to preserve an issue for appeal the issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on that issue." Brookside Mobile Home Park, Ltd. v. Peebles, 2002 UT 48 ¶ 14, 48 P.3d 968. There is a "plain error" exception to this rule. "The plain error test has three parts: the demonstration of error; a qualitative showing that the error was plain, manifest, or obvious to the trial court; and evidence that the error affected the substantial rights of a party." Jensen v. Sawyers, 2005 UT 81 ¶61, 130 P.3d 325.

The invited error doctrine is an exception to the "plain error" exception. *See* State v. Winfield, 2006 UT 4 ¶¶14-15 , 128 P.3d 1171 (citations omitted):

> [U]nder the doctrine of invited error, we have declined to engage in even plain error review when "counsel, either by statement or act, affirmatively represented to the [trial] court that he or she had no objection to the [proceedings]."
>
> Our invited error doctrine arises from the principle that " 'a party cannot take advantage of an error committed at trial when that party led the trial court into committing the error.' " By precluding appellate review, the doctrine furthers this principle by "discourag[ing] parties from intentionally misleading the trial court so as to preserve a hidden ground for reversal on appeal." Encouraging counsel to actively participate in all proceedings and to raise any possible error at the time of its occurrence " 'fortifies our long-established policy that the trial court should have the first opportunity to address a claim of error.' "

A review of the proceedings proves the Pratts did not invite error. Defendants responded to the Pratts' Complaint with a Rule 12(b)(6) motion to dismiss. In their reply memorandum, Defendants raised a judicial privilege argument. The trial court authorized the Pratts to file a supplemental memorandum addressing that issue. The Pratts filed their supplemental memorandum. Defendants filed a motion to strike the Pratts' supplemental memorandum, on the sole ground it had been filed late. Defendants submitted their motion to dismiss for decision the same day. The Pratts filed a memorandum in opposition to Defendants' motion to strike, together with a motion to strike the judicial proceeding privilege argument in Defendants' reply memorandum. Defendants did not oppose the Pratts' motion to strike, did not file a reply memorandum in support of their own motion to strike, and did not submit their motion to strike for decision. The Trial Court then entered its Ruling on all pending motions.

In State v. Penn, 2004 UT App 212 ¶23, 94 P.3d 308, the state argued the defendant had invited error by failing to object to a jury instruction. The Court disagreed:

> While the State is correct that Mr. Skordas initially seemed to agree with the instruction language, his subsequent actions clearly reflect that it was only a tentative agreement. This was confirmed the next day when he asked the trial court to remove the last sentence of the instruction. By asking for this change, we cannot say that Penn "led the trial court into committing the error" which he now appeals. Therefore, we reject the State's argument that Penn invited the alleged error he is now challenging.

The Pratts did not seek to take advantage of a plain error which they led the trial court into committing. The Pratts did not intentionally mislead the trial court so as to preserve a hidden ground for reversal on appeal. The Pratts affirmatively asked the trial court to address their legal arguments on the judicial proceeding privilege. They even opposed Defendants' motion to strike the Pratts' arguments, a motion that was never submitted for decision. The trial court had the first opportunity to address the Pratts' judicial proceeding privilege arguments but consciously chose not to. In other words, the Pratts did not invite the trial court's error.

The Pratts did not set the trial court up to rule erroneously on the scope of the judicial proceeding privilege. The Pratts' only error was in the timing of their Supplemental Memorandum, which although late was filed before Defendants submitted their Motion to Dismiss/for Summary Judgment for decision. Therefore, the Pratts' legal authorities were available to the trial court before Defendants' motion was ready for decision. *See* Utah R. Civ. Proc. 7(d): "When briefing is complete, either party may file a 'Request to Submit for Decision.' ... If no party files a request, the motion will not be submitted for decision." The fact that the Pratts had filed a supplemental memorandum gave the trial court notice there were arguments to be made, supported by precedential legal authority, that the judicial proceeding privilege did not apply. Trial courts routinely hear oral argument on dispositive motions. Judge Allphin could have held a hearing, during which the Pratts would have argued those authorities even in the absence of their supplemental memorandum.

Utah R. Civ. Proc. 7(c)(1) allows, in connection with a motion, a supporting memorandum, a memorandum in opposition, and a reply memorandum, "which shall be limited to rebuttal of matters raised in the memorandum in opposition." No other memoranda are to be considered without leave of court. The trial court considered the Defendants' judicial proceeding privilege argument although it was raised in their reply memorandum as a matter that was not limited to rebuttal of matters raised in the Pratts' memorandum in opposition. The trial court then affirmatively refused to consider the Pratts' supplemental memorandum even though the trial court had authorized it, and it was filed before the trial court ruled on Defendants' motion to dismiss, solely because it was filed late. The trial court did so in the face of the parties' cross motions to strike their opponents' arguments on judicial proceeding privilege, before those motions were submitted for decision. The Pratts contend that, while the trial court has discretion in such matters, for the trial court, in the face of the Pratt's objection, wilfully to ignore one side

of a legal argument presented on a dispositive issue, is an abuse of that discretion. Whether or not it was an abuse of discretion, however, it is clear that the Pratts did not invite the error.

Judge Allphin deliberately chose to ignore, or remain ignorant of, legal authorities on the judicial proceeding privilege issue that he knew existed and that the Pratts had provided him and asked him to consider. That is not invited error. The Court of Appeals committed reversible error by saying it was.

II. Defendants' Publications Were Not Protected by a "Group Defamation" Rule.

The Pratts alleged three categories of defamations: Defendants' republication of the Barrett Complaint at their press conference, which specifically refers to the Pratts by name; Defendants' verbal statements to the press conference attendees, referencing the Barrett Complaint; and the press and broadcast media's republication of Defendants' statements, again referencing the Barrett Complaint. The Court of Appeals erred by affirming the trial court's dismissal of those claims under the "group defamation" rule.

A. The Barrett Complaint Identified the Pratts by Name.

The Barrett Complaint, which Defendants republished by distributing it at their press conference, identifies Nevin Pratt and Denise Pratt by name. If the Barrett Complaint did not refer to and concern the Pratts, under Utah R. Civ. Proc. 12(b)(6) it would also fail to state a claim upon which relief could be granted against the Pratts. The "group defamation" rule simply does not apply to a defamation where a person is identified by name, even if he is one of others also identified by name. Such a publication is not a "group defamation" at all – it is specific defamations of specific individuals, however many.

If a person held up a legal directory of Utah's attorneys and announced all lawyers are shysters, it might be a group defamation, not actionable by any of them. But if that person took pen in hand, and using his own recollection singled out a hundred attorneys with whom he claimed personal dealings, and falsely said those specific attorneys had gathered together and physically assaulted him, his statement would be outside the group defamation rule, and actionable by each of the lawyers he had defamed. In the Barrett Complaint, Mary Ann used her own recollection and wrote down the names of specific persons with whom she claimed personal dealings, singling out and including Nevin Pratt and Denise Pratt by name, and falsely said the Pratts had personally committed specific torts against her personally. Where as here a publication singles out and identifies people by name, whether it is three names or three hundred, it directly refers to and concerns the persons named, and the so-called "group defamation" rule does not apply

B. Any "Group Defamations" Referred to and Concerned the Pratts.

Where the Barrett Complaint singles out and identifies people by name, it directly refers to and concerns those people. Defendants' other publications, by referencing the Barrett Complaint, necessarily also refer to and concerns the same people including Nevin and Denise Pratt, so the "group defamation" rule also does not apply to those publications either. Lynch v. Standard Pub. Co., 170 P. 770, 773 (Utah 1918), while over 80 years old, is this Court's most recent case addressing the "group defamation rule":

> [W]here words defamatory in their character seem to apply to a particular class of individuals, and are not specifically defamatory of any particular member of the class, an action can be maintained by any individual of the class who may be able to show the words referred to himself.

Dismissal is proper only where it is clear that the Pratts would not be entitled to relief under any state of facts they could prove to support their claim. One "state of facts" the Pratts could prove might be that statements such as the following were made at the

press conference. [3] One state of facts the Pratts could prove is that Douglas White might have said something like, "Mary Ann Kingston ... hopes to see civil justice punish and make an example of the people who harmed her, sending an unequivocal message to those people."

John Morris and the news media might have had a dialog something like this:

> REPORTER SIX [examining the Barrett Complaint]: ... I don't know, say, Ruth Davis. You've got her listed here. ... So, say, you think it's fair that Ann Kelly or Ruth Davis be bankrupt, no matter what their personal actions may have been?
>
> MR. MORRIS: Well, let me explain why that's the case ... The lady you mentioned probably has no checking account, no savings account, owns no property. There would be no reason for her to declare bankruptcy, because individually there would be no way for us to collect against her.
>
> REPORTER SEVEN: I have not read this [Third District Court Complaint given him/her by Defendants] carefully, but as near as I can tell, there just is zero evidence in here the AAA ... or Melanie Finley are in any way involved in any of this wrongdoing. Do you actually – are you going to tell us if you actually have some evidence ... ?
>
> MR. MORRIS: ... I can tell you this. Every allegation in that complaint is supported by evidence that we have obtained in our investigation.
>
> REPORTER SEVEN [looking at the Third District Court Complaint given him/her by Defendants]: ... Do you have evidence that Anna Jenkins actually did something wrong, or did you just get her name somewhere and throw it in?
>
> MR. MORRIS: Initially, once again, the complaint is not a place to present evidence. ...
>
> REPORTER SEVEN: Do you have any evidence against Anna Jenkins?
>
> MR. MORRIS: Yes, we do have evidence supporting the reasons for which Anna Jenkins is listed in that lawsuit. ...
>
> REPORTER SEVEN: What exactly in the case of Anna Jenkins did she do?
>
> MR. MORRIS: I can't tell you –

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[3] These statements, presented here as a hypothetical state of facts the Pratts could prove to support their claims, are actually verbatim excerpts from a transcript of the press conference, unfortunately obtained by counsel too late to include in the trial court record.

REPORTER SEVEN: Do you actually know something?

MR. MORRIS: - for each specific person as we sit here ...

A statement such as the last one would show that Defendants directed and intended their statements to refer to and concern, not some amorphous unidentifiable group, but "each specific person" identified by name in the Third District Court Complaint. A jury could find that taken as a whole from a state of facts like these that Defendants intended their statements to relate to and concern "each specific person" named as a defendant in the Third District Court Complaint, which includes the Pratts.

The Court of Appeals reasoned that the Pratts could not, without relying on the Barrett Complaint, show Defendants' other statements referred to the Pratts. But neither the trial court nor the Court of Appeals offered any explanation why the Pratts should not be able to rely on the Barrett Complaint to show Defendants's words at the press conference, even words describing a group, referred to the Pratts. Under the standard of review stated at page 1 *supra*, the law is to the contrary. The Lynch rule says it is reversible error to dismiss the Pratt's claims if the Pratts may be able to show Defendants referred to the Pratts at the press conference. There is no limitation on what evidence can be used to make that showing. Even if distribution of the Barrett Complaint at the press conference was not an excessive publication (it was) and was privileged (it was not), that point is irrelevant to whether the Pratts can use the Barrett Complaint as evidence of what persons Defendants were talking about at their press conference.

The general rule espoused in Lynch was earlier adopted in Fenstermaker v. Tribune Pub. Co., 43 P. 112 (Utah Terr. 1895) (Fenstermaker I):

> Where the words used seem to apply only to a class of individuals, and not to be specially defamatory of any particular member of that class, still the action can be maintained by any individual of that class who can satisfy ***the jury*** that the words referred especially to himself. ... [W]here the words, by any reasonable application, impute a charge to several individuals, under some general description or general name, either one coming within such

> description may successfully maintain an action, if ***the jury*** determine that the words have a personal application to the person bringing suit.

Fenstermaker I says that whether a "group defamation" refers especially to an individual, or has personal application to an individual, is a question of fact for the jury.

Utah was admitted as a state, and its Constitution came into force, on January 4, 1896, immediately following Fenstermaker I. The Utah Constitution, Article 1 § 11, states: "All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial ..." Shortly after Utah obtained statehood, this Court decided Fenstermaker v. Tribune Pub. Co., 45 P. 1097 (Utah 1896) (hereinafter Fenstermaker II), which held:

> One who publishes matter about a family in its collective capacity assumes the risk of its being libelous as to any member thereof. Any other rule would violate elementary principles of jurisprudence, in suffering a wrong to exist without a remedy, and would permit indiscriminating reference to the deeds of a single member of the family as the deeds of all collectively, while the odium should rest legally and morally only upon the member of the family who is guilty.

The Fenstermaker cases should be read in harmony with the contemporaneously adopted Utah Constitution. One who publishes a matter about a group in its collective capacity assumes the risk of its being libelous as to any member thereof. Any other rule would violate elementary principles of jurisprudence, in suffering a wrong to exist without a remedy, and so would violate Utah's unique "open courts" state constitutional requirement that every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law.

Defendants did not merely publish matters about a group in its collective capacity. They published a selective written list of specific persons naming the Pratts in particular, as to whom Defendants represented those specific persons were the particular ones against whom Defendants were directing their defamations. But even if the publications had been

limited to a group in its collective capacity (they were not), the Pratts still have causes of action under Utah law. Fenstermaker I says the Pratts have an action if they "can satisfy the jury that the words referred especially to himself." Fenstermaker II says Defendants assume the risk of group defamations being defamatory as to any member of a group. And Lynch says Defendants are liable for "group defamation" to any member of a group "who may be able to show the words referred to himself."

Even if this Court adopts the Restatement (Second) of Torts §564A as the Court of Appeals suggests, subpart (b) would apply: "One who publishes defamatory matter concerning a group or class of persons is subject to liability to an individual member of it if ... *the circumstances of publication* reasonably give rise to the conclusion that there is particular reference to the member."

The first "circumstance of publication" was Defendants' republication of Mary Ann's Complaint and its contents to the press conference attendees. That act was an extra-judicial republication by Defendants to the media of the statements summarized in Fact No. 5 *supra*. The Barrett Complaint names not some amorphous group, but rather names "individual defendants" including the Pratts. Defendants selectively identified the Pratts by name in the Barrett Complaint, hand-picking them from a larger group, as persons to whom their defamations referred. A carefully compiled list of named individuals does not identify a "group," it identifies the individuals. Defendants' statements in the Barrett Complaint clearly refer to and concern the Pratts.

The second "circumstance of publication" is that Defendants' verbal publications to the news media at their press conference were made in the context of the attendees having copies of the Barrett Complaint in hand at that time Defendants made their verbal publications. After distributing the Barrett Complaint, Defendants spoke to the press conference attendee about that lawsuit, interchangeably using terms such as "the people that we are bringing this lawsuit against," "the people who harmed her," "the key

members of the Kingston organization." "the leaders of the Kingston organization," "the Kingston family," "they," and "them" to refer to the defendants named in the Barrett Complaint including the Pratts in particular. Defendants used terms such as "the Order" and "organization." A reasonable person could readily conclude – indeed, it was crystal clear from the context – that Defendants intended those terms to refer to and concern the persons singled out and named as Defendants in the Barrett Complaint, including Nevin Pratt and Denise Pratt. It is reasonable to infer that the news media concluded that Defendants' verbal publications were intended to, and did, refer to and concern the individuals identified by name in that document, including the Pratts. This is only common sense. *See* Cuthbert v. National Organization for Women, 615 N.Y.S.2d 534, 536 (N.Y. A.D. 1994), in which the fact that defamatory material did not identify plaintiff a by name does not preclude his defamation suit. The plaintiff needed merely show the press conference referred to him, which he could do by showing members of the press were able to ascertain his identity through the records of a pending lawsuit.

Even where the group defamation rule applies, there is no hard and fast "bright line" rule cutting off claims as a matter of law based on the size of the group defamed. In Fawcett Publications, Inc. v. Morris, 377 P.2d 42 (Okla. 1962), a magazine publisher distributed an article falsely implying the University of Oklahoma football squad, some "sixty or seventy members," used drugs to enhance their performance. The court noted that "In *Ortenberg v. Plamondon et al.* ..., a member of the Jewish race in Quebec, consisting of 75 families out of a total city population of 80,000 people, could maintain an action of defamation of the entire group even though he was not assailed individually, but only as a member of the group." Id. at 51. Further, "'the primary consideration would properly seem to be whether the plaintiff was in fact defamed, although not specifically designated. Considerations adduced in support of the absolute denial of recovery are inconclusive, as against the desirability of providing a remedy for actual injury. ... A more realistic approach would recognize that

even a general derogatory reference to a group does affect the reputation of every member, and would adopt as its test the intensity of the suspicion cast upon the plaintiff.'" Id. at 52 (*quoting* 31 Columbia Law Review 1322, Liability for Defamation of a Group) The court held "the article libeled every member of the team, including the plaintiff, although he was not specifically named therein."

In Brady v. Ottaway Newspapers, Inc., 84 A.D.2d 226, 234-235, 445 N.Y.S.2d 786, (N.Y. App. 1981), which recognized a "group defamation" claim by at least fifty-three individuals, the court said:

> In New York there has been no articulated limit on size and we decline the opportunity to suggest one. An absolute limit on size is not justifiable. There is no compelling logic "in allowing a greater number of wrongs to afford a lesser degree of liability" in group defamation actions. (Lewis, *The Individual Member's Right to Recover for a Defamation Leveled at the Group*, 17 U. Miami L. Q. 519, 535.) In *Sumner v. Buel*, 12 Johns. 475, a case in which the majority opinion has since fallen into disrepute (1 Seelman, *Law of Libel & Slander in New York*, pars. 98-100), the dissenting Justice Van Ness pointed out the inequitable and illogical results of applying the policy against a multiplicity of suits in actions of this type (p. 482):
>
> > "I cannot assent to the idea, that the number of persons who may be libeled, affords the rule to determine whether or not an action will lie. Such a rule would be unjust and arbitrary. The libeller who calumniates a number of persons, by name, is liable to an action by each; and, in such a case, he would hardly be allowed to say, even in extenuation of his offence, much less in bar to the action, that, because he had exposed himself to so many actions, he ought not, therefore, to be punished at all. If such a rule should be adopted, the calumniator, who assails and reviles a great number of individuals in the same malicious publication, will escape; while the less guilty and less hardy slanderer, who has traduced the character of a single man only, shall be punished."

In Hansen v. Stoll, 636 P.2d 1236 (Ariz. App. 1981), the plaintiffs were among an unstated number of Drug Enforcement Administration (DEA) agents who responded to a tip of a drug drop-off at a remote airstrip. Stoll, who owned a nearby mine, saw what he thought was suspicious activity, and held the agents with a shotgun until the sheriff arrived. Stoll was convicted of assaulting a federal officer. He then accused a group he

described as "federal agents" of perjury and drug dealing. Some agents sued and won a judgment against Stoll for defamation. On appeal, the Court rejected Stoll's argument that his statements did not sufficiently identify specific persons, and so were not actionable. Stoll had referred to "federal agents," a group that likely numbered in hundreds if not thousands, only five of whom he ever identified by name, and that in only one of numerous defamatory communications. The court held the question was whether persons not identified by name could be connected to the defamatory remarks, and left it to the jury to make that connection based on the evidence at trial: "It is not necessary to prove that every reader could make the connection, as publication to any individual will suffice. ... The question of identification is for the jury to decide." Id. at 1241.

Here, even if Defendants had not selectively named the Pratts in writing, it is for the jury to determine that the Pratts can be connected to Defendants' defamatory statements. Defendants established the connection themselves, by giving the witnesses of their defamations the Barrett Complaint, containing a written list identifying the Pratts by name as those to whom Defendants' defamatory publications applied, and referring back to the defendants in that lawsuit as those against whom they directed their publications.

The policy behind the "group defamation" rule is not to bar multiple lawsuits by large numbers of defamed individuals. Such a policy would run directly afoul of Article I, Section 11 of the Utah Constitution, which provides, "All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial ..." The very idea that the more people injured, the less right they have to sue, is antithetical to this "open courts" provision. Rather, under Utah law the "group defamation" rule is a rule of reason, a common sense application of the concepts that a party claiming defamation must have been injured, and that publications not referring to anyone in particular have not injured anyone in particular. All "what if" scenarios are answered by this principal. For

example, if a person merely holds up a Utah Attorney Directory and says "all lawyers are shysters," his statement is not actionable. But if he opens the same book and, reading names from it, falsely says, "David Aagard assaulted me. Richard Aaron assaulted me. Charles Abbot assaulted me. Douglas Adair assaulted me. John Adams assaulted me. Robert Adler, John Alex, and Steven Allred assaulted me," and continues on in that vein, identifying people by name and saying each one assaulted him, each one so named has been defamed, not as a group but as an individual. Each person so named has a cause of action, whether the tortfeasor called out three names, or thirty, or three hundred. This case is the second "what if." Defendants provided the press conference attendees with the Barrett Complaint, which makes specific defamations of the Pratts, and then made verbal publications showing they intended their statements to refer to each individual defendant including the Pratts. It is a question for the jury whether Defendants' words have a personal application to the Pratts. Even the Trial Court recognized this fact in its Ruling [R 245] when it admitted, "Our high court, however, also stated that where the words refer only to a class of individuals, yet can be interpreted as referring to an individual or limited individuals, that person or those persons can maintain an action for liable. This would seem to indicate a factual issue, improper for the Court to decide at this point." It was error to for the Trial Court to resolve that factual issue against the Pratts, and reversible error for the Court of Appeals to affirm it.

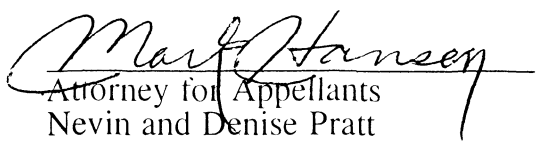
For the same reasons, Defendants' publication of matters constituting an invasion of privacy also concern the Pratts.

Utah law says any person who can satisfy a jury that a group defamation refers to himself has a cause of action. Defendants selectively identified and defamed the Pratts by name, in a manner allowing a jury to find their additional publications not identifying the Pratts by name also referred to and concerned them. The Trial Court, and later the Court of Appeals, committed reversible error by taking that issue from the jury.

CONCLUSION - RELIEF SOUGHT

Based on the above, Nevin Pratt and Denise Pratt respectfully ask this Court to reverse the opinion of the Court of Appeals, reverse the trial court's August 17, 2004 Rulings on Defendants' Motion to Strike Plaintiff's Supplemental Memorandum, Ruling on Plaintiff Pratts' Motion to Strike Defendants' "Judicial Privilege" Argument, and Ruling on Defendants' Motion for Summary Judgment, hold that Defendants' press conference was not protected by judicial proceeding privilege, hold the Pratts' claims are not barred by the so-called group defamation rule, and remand this action for trial.

DATED May 10, 2006.



Attorney for Appellants
Nevin and Denise Pratt

CERTIFICATE OF SERVICE

I certify on May 10, 2006 copies of the above were served by first class mail to:

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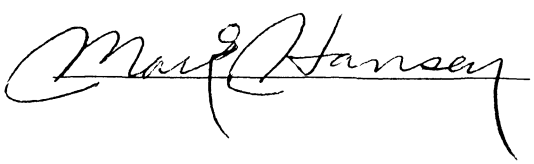

ADDENDUM

12/15/2005 Pratt v. Nelson, 2005 UT App 541.

08/17/2004 Pratt v. Nelson, Trial Court's ruling on various motions including Defendants' Motion for Summary Judgment.

IN THE UTAH COURT OF APPEALS

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Nevin Pratt and Denise Pratt, Plaintiffs and Appellants, v. Mary Ann Nelson; Douglas F. White; John Dustin Morris; William A. Mark; McKay, Burton & Thurman, P.C.; and Does 1-200, Defendants and Appellees.	OPINION (For Official Publication) Case No. 20040752-CA F I L E D (December 15, 2005) 2005 UT App 541

Second District, Farmington Department, 040700075
The Honorable Michael G. Allphin

Attorneys: F. Mark Hansen and Carl E. Kingston, Salt Lake City, for Appellants
John Dustin Morris, Salt Lake City, Douglas F. White, Bountiful, and William A. Mark, North Salt Lake, for Appellees

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Before Judges Billings, Bench, and Orme.

ORME, Judge:

¶1 Nevin and Denise Pratt were named as defendants in a lawsuit against alleged members of a polygamous cult. Counsel for plaintiff in that case held a press conference about the lawsuit, out of which this defamation action arose. In this appeal, the Pratts seek to overturn a ruling on summary judgment dismissing their lawsuit with prejudice. Specifically, the Pratts appeal the trial court's application of the judicial proceeding privilege and group defamation doctrine to bar their claims. We affirm.

BACKGROUND

¶2 On February 11, 2004, the Pratts brought claims of defamation, invasion of privacy, and civil conspiracy against

Defendants Mary Ann Nelson; Douglas F. White; John Dustin Morris; William A. Mark; and McKay, Burton & Thurman, P.C. (collectively "the Defendants") following a press conference the Defendants held and participated in on August 28, 2003. The press conference was characterized by the Defendants as a preemptive effort to address the likely media attention that Mary Ann Nelson's lawsuit against David and Daniel Kingston would garner. Nelson, with the assistance of her attorneys--the other defendants named by the Pratts--had filed a complaint against David Kingston, Daniel Kingston, and many others (the Kingston Complaint), seeking damages for various alleged batteries and other torts. At the press conference, Nelson and at least two of her attorneys made statements to the press concerning the Kingston Complaint and its allegations. The Defendants distributed copies of the Kingston Complaint to members of the press who were present and, upon the request of a reporter, provided copies of the statement that Nelson read at the press conference (Nelson's Press Statement).[1]

¶3 Of particular relevance to this case are the Kingston Complaint's claims of infliction of emotional distress, civil conspiracy, and negligence against over 200 individual defendants, including the Pratts. As to these defendants, the Kingston Complaint specifically alleged that as members of a secretive religious society and economic organization known as "the Order," the defendants assisted, encouraged, or knew of--and failed to prevent or report--the alleged torts committed by David and Daniel Kingston against Nelson.

¶4 The Defendants responded to the Pratts' lawsuit by moving to dismiss it for failure to state a claim. The Pratts filed a memorandum in opposition to the motion to dismiss, and the

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1. Nelson's written statement reads:

> My name is Mary Ann and I was raised in the Kingston Polygamist Family. I escaped when I was 16 years old. I am pursuing this lawsuit with the hope that other young girls and boys in the same position that I was in will see that the leaders of the Kingston organization are not above the law even though they tell us that they are, that they can be punished for what they do to us, and that we can escape and seek recovery for the harm that was done to us. I also hope that the people that we are bringing this lawsuit against will realize the harm they have caused and continue to cause, and that they will change their ways.

Defendants then responded with a reply memorandum in support of their motion to dismiss. In the reply memorandum, the Defendants argued for the first time that "judicial immunity, an absolute privilege to a claim of defamation," protected the Kingston Complaint, thereby barring any of the Pratts' defamation claims founded on the Kingston Complaint. In addition, the Defendants also included an affidavit with their reply memorandum that, among other things, averred that the Defendants had only generally referred to the defendants named in the Kingston Complaint as the "'society,' 'organization,' and 'the Order'" at the press conference, never mentioning the Pratts by name. The trial court did not exclude the affidavit and thereafter properly treated the Defendants' motion, under rule 12 of the Utah Rules of Civil Procedure, as a motion for summary judgment. See Utah R. Civ. P. 12(b).

¶5 Because the motion to dismiss had been converted into a motion for summary judgment, the trial court entered an order allowing the parties ten days to submit "all supporting material . . . pertinent to the motion for summary judgment." The Pratts presented no additional supporting material and neither did the Defendants.[2] In a separate order, the trial court acknowledged that the Defendants had raised the issue of judicial privilege for the first time in their reply memorandum and, in the interest of fairness, allowed the Pratts an additional eight days to file a responsive memorandum, limited to the issue of judicial privilege. The Pratts did not file their responsive memorandum concerning the issue of judicial privilege until over a month after the trial court's deadline for filing the memorandum had

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2. Relying on appellate rule 11, the Pratts filed a motion with this court to supplement the record and now seek to add to the record a transcript of a video recording of the press conference held August 28, 2003. See Utah R. App. P. 11(h) (allowing for the "[c]orrection or modification of the record" transmitted to this court for the purposes of an appeal "[i]f anything material to either party is omitted from the record by error or accident or is misstated"). The Pratts contend that they are seeking to supplement the record in order to correct one "deliberate and wilful falsehood" and one misstatement the Defendants have made in their appellate brief about what was said at the press conference. We deferred ruling on the motion pending plenary consideration of the matter and now deny the Pratts' motion as beyond the scope of rule 11. See Olson v. Park-Craig-Olson, Inc., 815 P.2d 1356, 1359 (Utah Ct. App. 1991) (explaining that the record on appeal may only be supplemented "because of an omission or exclusion, or a dispute as to the accuracy of reporting, and not to introduce new material into the record") (citation omitted).

passed. The Pratts offered no explanation for their tardiness in filing, nor did they seek an extension of the deadline. The Defendants moved to strike the Pratts' late responsive memorandum, and in return, the Pratts moved to strike the Defendants' judicial privilege argument as improperly raised for the first time in a reply memorandum.

¶6 The trial court granted the Defendants' motion to strike the Pratts' memorandum, ruling that the Pratts' late memorandum was unauthorized under rule 7 of the Utah Rules of Civil Procedure and would, therefore, not be considered. The trial court also denied the Pratts' motion to strike the Defendants' judicial privilege argument, reasoning that the Pratts had been given the opportunity to address the argument but had chosen not to respond within the allotted time and were "solely to blame" for their own late filing and could not now "complain of unfairness." The trial court then proceeded, without a hearing, to rule on the Defendants' motion for summary judgment.

¶7 In its ruling, the trial court concluded that the Kingston Complaint was covered by the judicial proceeding privilege, which "acts as an absolute bar to the Pratts' claim of defamation arising from allegations made in [the Kingston Complaint]."[3] It also concluded that Nelson's Press Statement was not defamatory towards the Pratts, as a matter of law, because the statement never directly mentioned the Pratts, but only referred to a larger group of persons, i.e., "the leaders of the Kingston organization," "the people that we are bringing this lawsuit against," "the Kingston Polygamist Family," etc. The trial court based this conclusion on the Defendants' unrefuted affidavit, which set forth what the Defendants said at the press conference.[4]

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3. The trial court based its ruling on the general rule stated in Krouse v. Bower, 2001 UT 28, 20 P.3d 895, "that judges, jurors, witnesses, litigants, and counsel involved in a judicial proceeding have an absolute privilege against suits alleging defamation." Id. at ¶8. The trial court reasoned that the complaint was covered by the judicial proceeding privilege because the privilege covers "all pleadings and affidavits necessary to set the judicial machinery in motion." DeBry v. Godbe, 1999 UT 111, ¶12, 992 P.2d 979 (internal quotations and citation omitted).

4. Because the Pratts did not file any opposing evidence after the Defendants' motion to dismiss was properly converted to a motion for summary judgment, the trial court rightly concluded there was no genuine issue of disputed fact as to what was said at the press conference. See Amica Mut. Ins. Co. v. Schettler,

(continued...)

ISSUES AND STANDARDS OF REVIEW

¶8 The Pratts ask us to determine whether the trial court erred in granting summary judgment against them, thereby dismissing their claims.[5] Summary judgment is proper when "there is no genuine issue as to any material fact and [when] the moving party is entitled to a judgment as a matter of law." Utah R. Civ. P. 56(c). "In reviewing the district court's grant of summary judgment, we view the facts and inferences therefrom in the light most favorable to the nonmoving party." Badger v. Brooklyn Canal Co., 966 P.2d 844, 847 (Utah 1998). "Because summary judgment is granted as a matter of law, we give the trial court's legal conclusions no particular deference." Hodgson v. Bunzl Utah, Inc., 844 P.2d 331, 333 (Utah 1992).

¶9 The Pratts also ask us to determine whether the trial court erred in striking their untimely memorandum on the issue of judicial privilege while refusing to strike the Defendants' judicial privilege argument raised for the first time in the Defendants' reply memorandum. "Motions to strike pleadings or parts thereof are addressed to the judgment and discretion of the trial court. A ruling thereon, except under circumstances which amount to a clear abuse of discretion, will not be disturbed on appeal." Adams v. Portage Irrigation, Reservoir & Power Co., 95 Utah 1, 72 P.2d 648, 651 (1937).

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4. (...continued)
768 P.2d 950, 957 (Utah Ct. App. 1989)("[W]hen the moving party has presented evidence sufficient to support a judgment in its favor, and the opposing party fails to submit contrary evidence, a trial court is justified in concluding that no genuine issue of fact is present or would be at trial."), cert. denied, 109 Utah Adv. Rep. 39 (1993).

5. The Defendants argue that the Pratts have not briefed or challenged certain aspects of the trial court's ruling, contending that the Pratts have waived those issues. Our review of the trial court's ruling and the Pratts' arguments on appeal reveals, however, that the only aspect of the trial court's ruling the Pratts have not meaningfully challenged on appeal is the trial court's reasons for dismissing the Pratts' civil conspiracy claim. "It is axiomatic that we will presume the correctness of lower court rulings that neither party challenges on appeal." Dansie v. Hi-Country Estates Homeowners Ass'n, 2004 UT App 149,¶10, 92 P.3d 162. Thus, we do not specifically address the dismissal of the Pratts' civil conspiracy claim.

ANALYSIS

I. Judicial Privilege

¶10 We first consider the Pratts' argument that the trial court erred in striking their late-filed memorandum, as our decision on that issue influences other aspects of the Pratts' appeal. The trial court ruled that the Pratts' memorandum was "an unauthorized memorandum" that the court would not consider and granted the Defendants' motion to strike the memorandum. The Pratts contend, however, that their memorandum was not "unauthorized," but "merely untimely," and that the trial court abused its discretion in deciding not to consider it. Moreover, the Pratts argue that the trial court's treatment of their untimely memorandum and its treatment of the Defendants' late-raised judicial privilege argument was inconsistent, prejudicial to them, and an abuse of the trial court's discretion.

¶11 The Pratts contend that, unlike the harm they suffered when the Defendants raised the judicial privilege argument for the first time in a reply memorandum, the Defendants would not have been prejudiced, nor the trial court inconvenienced, if the court had considered the memorandum in spite of its tardiness. While the trial court could have, as a matter of judicial power, opted to consider the late-filed memorandum, we cannot say that the trial court abused its discretion in deciding to strike the Pratts' late memorandum. Nor can we say that it abused its discretion in permitting the judicial privilege argument to remain in issue, even though it was raised for the first time in a reply memorandum, or in permitting the Pratts to respond, should they desire, within only eight days.

¶12 Generally, appellate courts grant "[a] trial judge . . . broad discretion in determining how a [case] shall proceed in his or her courtroom." University of Utah v. Industrial Comm'n, 736 P.2d 630, 633 (Utah 1987). While rule 7 of the Utah Rules of Civil Procedure states that a party's "reply memorandum . . . shall be limited to rebuttal of matters raised in the [other party's] memorandum in opposition" to a motion, Utah R. Civ. P. 7(c)(1), the rule also allows the trial court discretion to consider other memoranda. See id. ("No other memoranda will be considered without leave of the court.") (emphasis added). Thus, when an issue is raised for the first time in a reply memorandum, a trial court may properly opt to "grant a motion to strike issues raised for the first time in a reply memorandum."

U.P.C., Inc. v. R.O.A. Gen., Inc., 1999 UT App 303,¶63, 990 P.2d 945. But

> as a matter of judicial economy, where there is no prejudice (i.e., where the opposing party is able to respond) and where the issues could be raised simply by filing a separate motion to dismiss, the trial court has discretion to consider arguments raised for the first time in a reply memorandum.[6]

Trillium USA, Inc. v. Board of County Comm'rs, 2001 UT 101,¶17 n.3, 37 P.3d 1093. Cf. Hartford Leasing Corp. v. State, 888 P.2d 694, 702 n.9 (Utah Ct. App. 1994) ("Nothing prevents the trial court from receiving additional memoranda if it wishes to do so.").

¶13 Given the facts of this case, we see no abuse of discretion. After deciding to consider the Defendants' judicial privilege argument, the trial court appropriately allowed the Pratts time to respond to the issue with their own memorandum. Thus, the Pratts were not blind-sided or otherwise prejudiced by the trial court's decision to consider the Defendants' judicial privilege argument.

¶14 We also conclude that the trial court's decision to strike the Pratts' memorandum as unauthorized after it was filed one month too late also falls within the trial court's broad discretion to manage the case before it. See Adams v. Portage Irrigation, Reservoir & Power Co., 95 Utah 1, 72 P.2d 648, 651 (1937). Cf. Barnard v. Wassermann, 855 P.2d 243, 249 (Utah 1993) (noting that trial courts have the power to impose sanctions to control the proceedings before them); Johnson v. Peck, 90 Utah 544, 63 P.2d 251, 253-54 (1936) (holding that trial court did not abuse its discretion in refusing amendments to pleadings because they came too late). While the Pratts claim they are prejudiced by the trial court's decision to strike their memorandum, it is clear that any harm the Pratts suffered is self-inflicted. The Pratts filed the memorandum one month later than the trial court's deadline, without any effort to explain their lateness or to seek an extension of the deadline. The trial court's decision

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6. The trial court in this case may well have been motivated by considerations of judicial efficiency and economy. Had the trial court refused to consider the judicial privilege issue raised for the first time in the Defendants' reply memorandum, the issue was one that Defendants could simply have raised by filing another motion to dismiss or for summary judgment.

to strike the memorandum falls well short of being arbitrary. The Pratts, at their own peril, failed to timely file their responsive memorandum on the issue of judicial privilege.

¶15 With the Pratts' memorandum stricken from the trial court's consideration, the Defendants' assertions that a judicial privilege applied in this case were unopposed and uncontested. Being persuaded by the Defendants' judicial privilege arguments, the trial court ruled on summary judgment "that the doctrine of judicial privilege acts as an absolute bar to the Pratts' claim of defamation arising from allegations made in [the Kingston Complaint]." Given what was before the court, this ruling appears to be entirely correct. The Pratts now challenge the correctness of the trial court's summary judgment determination that a judicial privilege applies to the Kingston Complaint. The Defendants argue, however, that because of the Pratts' failure to timely file their memorandum presenting their legal arguments to the trial court, they cannot now ask this court to consider their judicial privilege arguments for the first time on appeal.

¶16 The Defendants' argument is well taken. In a situation like the instant one, the invited error doctrine comes into play to prevent us, for sound policy reasons, from reaching the merits of the trial court's ruling on the issue of judicial privilege. Utah's appellate courts apply the invited error doctrine, in part, "to give the trial court the first opportunity to address the claim of error" from which a party may later seek appellate relief. State v. Geukgeuzian, 2004 UT 16,¶12, 86 P.3d 742. This is so because, as has been noted, "fairness dictates that the trial judge should not be reversed on an issue he [or she] never considered, for if the issues had been presented, it is possible that no error would have been committed." Justice Michael J. Wilkins et al., A "Primer" in Utah State Appellate Practice, 2000 Utah L. Rev. 111, 126 (2000) (alteration in original) (internal quotations and citation omitted).

¶17 While the instant case does not bear the more tell-tale signs of a decision by a party to "intentionally mislead[] the trial court so as to preserve a hidden ground for reversal on appeal," State v. Dunn, 850 P.2d 1201, 1220 (Utah 1993), it does implicate the sound rationale behind many cases decided under the invited error doctrine. Our appellate courts "have held repeatedly that on appeal, a party cannot take advantage of an error committed at trial when that party led the trial court into committing the error." Id. Indeed, the alleged error from which the Pratts now seek appellate relief was caused, in no small part, by the Pratts' own disregard for the trial court's deadline for responding to the newly-raised issue of judicial privilege. The Pratts were put on notice that the trial court intended to

consider the merits of the Defendants' judicial privilege argument, and they were given a specific opportunity to argue their side of the issue to the trial court and explain why judicial privilege should not apply.

¶18 The Pratts, however, did not see fit to file their memorandum in a timely manner, nor did they explain their lateness and seek more time to file the memorandum. Had the Pratts responded in a timely manner, the error they now allege in the trial court's ruling would have been brought to the trial court's attention and possibly avoided. We conclude that the Pratts cannot simply disregard the trial court's deadline, have their late memorandum stricken as a result, and expect to be able to nevertheless have the trial court reversed on appeal if it decided the issue incorrectly without the aid of their memorandum.

II. Group Defamation

¶19 While the trial court applied the judicial proceeding privilege to the Kingston Complaint, the trial court did not definitively rule that Nelson's Press Statement was also covered by the privilege.[7] Instead, the trial court ruled, as a matter of law, that the Pratts could not, without relying on the Kingston Complaint, show that any of the alleged defamatory statements refer to them because the Pratts were never mentioned in Nelson's Press Statement nor did the circumstances imply any reference to the Pratts.[8] It therefore concluded that the

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7. In its ruling, the trial court noted that it "cannot say unequivocally that the press statement is not covered by the judicial proceeding privilege," and put forth reasons why it arguably "could be protected by judicial privilege." Yet the trial court ultimately relied on other grounds in dismissing the Pratts' defamation claims insofar as they were premised on statements other than those made in the Kingston Complaint, which leads us to conclude that the trial court's insights on whether the judicial privilege extended to Nelson's Press Statement never culminated in an actual legal ruling.

8. In the trial court's view, none of Nelson's allegedly defamatory statements ever directly mentioned the Pratts by name and, aside from the Kingston Complaint, none of the extrinsic facts and circumstances demonstrated that the statements were intended to specifically refer to the Pratts. The trial court found that the allegedly defamatory statements merely referred generally to large groups of people, i.e., "the Kingston

(continued...)

alleged defamatory statements could not be interpreted by a reasonable jury to be libelous or slanderous towards the Pratts. The Pratts argue, however, that even if Utah law recognizes a "so-called" group defamation rule, they may be able to convince a jury that the words used by the Defendants at the press conference, even without the aid of the Kingston Complaint, referred to them and that they should, therefore, have been allowed to proceed to trial.

¶20 It is clear under Utah law that defamatory statements concerning a group or class of people may not be actionable by each individual member of the defamed group or class. "In order to state a claim for defamation under Utah law, a plaintiff must show [, among other things,] 'that defendants published the statements concerning him [either in print or by spoken words] . . . .'" Wayment v. Clear Channel Broad., Inc., 2005 UT 25,¶18 n.2, 116 P.3d 271 (emphasis added) (second alteration in original) (citation omitted). Thus, under Utah law, in order for defamatory statements "to be regarded actionable they must refer to some ascertained or ascertainable person, and that person must be the person complaining, shown to be such by directly being named, or so intended from the extrinsic facts and circumstances." Lynch v. Standard Publ'g Co., 51 Utah 322, 170 P. 770, 773 (1918). See also Fenstermaker v. Tribune Publ'g Co., 12 Utah 439, 43 P. 112, 114 (1895) (stating that defamatory statements "must refer to some ascertained or ascertainable person" in order to be actionable). It follows then, as the Utah Supreme Court has stated, that

> where words defamatory in their character seem to apply to a particular class of individuals, and are not specifically defamatory of any particular member of the class, an action can be maintained by any individual of the class who may be able to show the words referred to himself.

Lynch, 170 P. at 773 (emphasis added). See also Fenstermaker, 43 P. at 114; W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 111, at 784 (5th ed. 1984). It also necessarily follows, however, that "[w]here the defamatory matter has no special application and is so general that no individual damages can be presumed, and the class referred to is so numerous that

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8. (...continued)
Polygamist Family," "leaders of the Kingston organization," etc., and not the Pratts specifically, thus barring their action for defamation.

great vexation and oppression might grow out of a multiplicity of suits, no private suit can be maintained." Lynch, 170 P. at 774 (emphasis added) (internal quotations and citation omitted). See Fenstermaker, 43 P. at 114; W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 111, at 784 (5th ed. 1984).

¶21 The Restatement's "Defamation of a Group or Class" rule, which we apply to the instant case, concisely states the principles Utah case law has espoused in the group defamation context:

> One who publishes defamatory matter concerning a group or class of persons is subject to liability to an individual member of it if, but only if,
>
> (a) the group or class is so small that the matter can reasonably be understood to refer to the member, or
>
> (b) the circumstances of publication reasonably give rise to the conclusion that there is particular reference to the member.

Restatement (Second) of Torts § 564A (1977) (emphasis added). The Pratts argue that under the above rules a jury could reasonably make the connection between the Pratts and the statements made during the press conference, even without reference to the Kingston Complaint, but the facts of this case prevent that conclusion. Indeed, without the aid of the Kingston Complaint, the Defendants' statements at the press conference cannot reasonably be understood to refer, with any particularity, to the Pratts.

¶22 The only place where the Pratts are identified by name is in the Kingston Complaint, where they are listed with some 200 other individual defendants. Without the Kingston Complaint, the Pratts can only point to the Defendants' group references and argue that such statements defame them as individuals. Admittedly, under the right circumstances the references to a group such as "the Kingston Polygamist Family" might reasonably be understood to refer to an individual surnamed Kingston. See Fenstermaker, 43 P. at 114 (allowing head of a family to maintain an action for defamation where defamatory statements were made about "a family named Fenstermaker"). But see Restatement (Second) of Torts § 564A cmt. a, illus. 1 (1977) (giving hypothetical example where defamatory statements about a large family would not be actionable by individual family members). In fact, if the Pratts were widely known as members of "the Kingston Polygamist Family," the Pratts might very well be able to maintain an action on such statements, even without referring to

the Kingston Complaint. See Fawcett Publ'ns, Inc. v. Morris, 377 P.2d 42, 51-52 (Okla. 1962) (holding that a single member of a large university football team could maintain a lawsuit for libel for general statements about the team since he was "well known and identified in connection with the group" and because he "ha[d] sufficiently established his identity as one of those libeled by the publication"), cert. denied, 376 U.S. 513 (1964). See also Restatement (Second) of Torts § 564A cmt. b (observing that a statement such as "'That jury was bribed' may reasonably be understood to mean that each of the twelve jurymen has accepted a bribe," giving each member a cause of action for defamation). Cf. id. § 564A cmt. a (observing that the statement "'All lawyers are shysters,' . . . cannot ordinarily be taken to have personal reference to any of the class"). The nature and size of the group must be such that "the words may reasonably be understood to have personal reference and application to any member of it, so that he is defamed as an individual." Id. § 564A cmt. b.

¶23 In the instant case, the nature and size of the groups referred to, and the circumstances of publication, do not lend themselves to any reasonable understanding that they have personal application to the Pratts. While the Pratts argue that it is for a jury to decide whether they can be connected to Defendants' statements about the group or groups mentioned, we conclude that the trial court properly resolved the issue on summary judgment. Indeed, there is nothing in the record before us, other than the Kingston Complaint, that makes a connection between the Pratts and the group or groups identified in the Defendants' statements. There was no dispute of fact that only general references were made at the press conference to groups and that the Pratts were never mentioned by name, and nothing in the record gives rise to any sort of reasonable understanding that the Pratts were included in the extrajudicial references to these groups. We therefore conclude that the trial court properly disposed of this issue on summary judgment.

CONCLUSION

¶24 We do not reach the merits of the Pratts' challenge on appeal against the trial court's application of the judicial proceeding privilege to the Kingston Complaint, because the Pratts invited any error in the trial court's ruling. As a result, we affirm the trial court's ruling dismissing the Pratts' claims that are founded upon their names appearing in the Kingston Complaint. Consequently, the Pratts cannot rely on any references to them in the Kingston Complaint to support their claims based on statements the Defendants made at the press

conference. The Defendants' statements cannot, therefore, be reasonably understood to refer to the Pratts without the aid of the Kingston Complaint. The only other statements alleged to be defamatory refer to larger amorphous groups and are not actionable by the Pratts. Thus, the trial court's summary judgment ruling in favor of the Defendants was proper.

¶25 Affirmed.

_____
Gregory K. Orme, Judge

¶26 WE CONCUR:

_____
Judith M. Billings,
Presiding Judge

_____
Russell W. Bench,
Associate Presiding Judge

IN THE SECOND DISTRICT COURT, DAVIS COUNTY
STATE OF UTAH

NEVIN PRATT and DENISE PRATT, Plaintiffs, vs. MARY ANN NELSON, DOUGLAS F. WHITE, JOHN DUSTIN MORRIS, WILLIAM A. MARK, MCKAY, BURTON & THURMAN, P.C., and DOES 1-CC, Defendants.	**RULING ON PLAINTIFF PRATTS' MOTION TO CONSOLIDATE** **AND** **RULING ON DEFENDANTS' MOTION TO STRIKE PLAINTIFFS' SUPPLEMENTAL MEMORANDUM** **AND** **RULING ON PLAINTIFF PRATTS' MOTION TO STRIKE DEFENDANTS' "JUDICIAL PRIVILEGE" ARGUMENT** **AND**
F. MARK HANSEN and SUZANNE HANSEN, Plaintiffs, **vs.** MARY ANN NELSON, DOUGLAS F. WHITE, JOHN DUSTIN MORRIS, WILLIAM A. MARK, MCKAY, BURTON & THURMAN, P.C., and DOES 1-CC, Defendants.	**RULING ON PLAINTIFF HANSENS' MOTION TO STRIKE DEFENDANTS' REQUEST TO SUBMIT** **AND** **RULING ON DEFENDANTS' MOTION TO DISMISS PLAINTIFF HANSENS' ACTION** **AND** **RULING ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** Case Nos. 040700075; 040800519 Judge Michael G. Allphin

This matter is before the Court on: (1) plaintiff Pratt's Motion to Consolidate; (2) defendants' Motion to Strike Plaintiff Pratt's Supplemental Memorandum; (3) plaintiff Pratt's Motion to Strike Defendants' "Judicial Privilege" Argument; (4) plaintiff Hansens' Motion to Strike Defendants' Request to Submit; (5) defendants' Motion to Dismiss Plaintiff Hansens' Action; (6) and defendants' Motion for Summary Judgment as to the Pratts' claims. The Court has read the parties' moving and responding papers and for the reasons set forth below, rules as follows; the Court: (1) grants plaintiff Pratt's Motion to Consolidate; (2) grants defendants' Motion to Strike Plaintiff Pratt's Supplemental Memorandum; (3) denies plaintiff Pratt's Motion to Strike Defendants' "Judicial Privilege" Argument; (4) denies plaintiff Hansens' Motion to Strike Defendants' Request to Submit; (5) grants defendants' Motion to Dismiss Plaintiff Hansens' Action without prejudice; and (6) grants defendants' Motion for Summary Judgment as to the Pratts' claims. Finding the issues to be clear, and the briefing complete, the Court finds a hearing would not aid it in making a decision and denies defendants' request for hearing.

BACKGROUND

This matter concerns the Pratts and Hansens' claims of defamation against defendants, which defamation allegedly occurred at a press conference August 28, 2003 held by defendant Mary Ann Nelson, a.k.a. Mary Ann Kingston and Mary Ann Roe, and her attorneys from the law firm McKay, Burton & Thurman.

Defendant Mary Ann Nelson (referred to as Mary Ann Nelson in the Pratts' Complaint) was born into a family that allegedly practiced polygamy, among a society of other polygamist families; defendants referred to the society as "the Order", "the Coop", and "the Kingston Organization", and the "Kingston Polygamist Family." Defendant Mary Ann Nelson ("Nelson")

left the society and later filed a civil action against several members of the society (Case No. 030917113 before the Hon. William Barrett, Utah Third District Court) alleging—among other claims—sexual abuse of a child, seduction, assault, battery, false imprisonment, intentional and negligent infliction of emotional distress, and civil conspiracy. Plaintiffs in this matter are among about 389 named defendants in the civil action in the Third District Court.

On August 28, 2003, defendant and her attorneys—also defendants in this matter —held a press conference. Various members of the Utah press attended, as well as at least one national press association, the Associated Press. Defendants distributed copies of the Complaint filed in defendant Kingston's civil action to members of the press attending; the Complaint was the only document that contained plaintiffs' name. Defendants referred to allegations in their Complaint and generally alleged in a statement that members of the society committed the acts. At the press conference, however, plaintiffs were never specifically identified, named or referenced. Defendants distributed only two documents at the press conference: a copy of the Complaint filed in the civil action, and a copy of defendant Nelson's written statement which she read at the press conference and which went to at most three members of the press. The written statement reads:

> Mary Ann's Statement to the Press
>
> My name is Mary Ann and I was raised in the Kingston Polygamist Family. I escaped when I was 16 years old. I am pursuing this lawsuit with the hope that other young girls and boys in the same position that I was in will see that the leaders of the Kingston organization are not above the law even though they tell us that they are, that they can be punished for what they do to us, and that we can escape and seek recovery for the harm that was done to us. I also hope that the people that we are bringing this lawsuit against will realize the harm they have caused and continue to cause, and that they will change their ways.

Plaintiffs, both the Pratts and Hansens, each filed a civil action against defendants, alleging defamation–both slander and libel, invasion of privacy, and civil conspiracy. Plaintiffs sought injunctive relief and monetary damages. The Pratts filed their claim on February 11, 2004 before this Court. F. Mark Hansen and Suzanne Hansen filed their claim on April 9, 2004, in this District, but in the Bountiful Department before the Hon. Glen R. Dawson (Case No. 040800519). The claims, defendants, and underlying facts before Judge Dawson are identical to those before this Court. The Hansens filed a Motion to Consolidate and Judge Dawson granted their Motion. The Pratts also filed a Motion to Consolidate this Motion with the Hansen matter; defendants did not respond to the Motion.

Defendants in this matter filed their Motion to Dismiss and supporting memorandum March 4, 2004. The Pratts filed their Response March 15, 2004. Defendants filed their Reply March 24, 2004 along with the Affidavit of William A. Mark. The Court accepted the Affidavit and in an Order of April 12, 2004, allowed all parties ten days to submit all supporting materials made pertinent to the defendants' Motion, i.e. opposing affidavits by the Pratts. Neither the Pratts, nor defendants submitted further supporting materials. The Court having accepted matters outside the pleadings, defendants' Motion to Dismiss, before this Court, was converted to a Motion for Summary Judgment. Defendants filed their Request to Submit on their Motion for Summary Judgment June 23, 2004.

Defendants, however, raised an argument for the first time in their Reply that was not raised in their initial memorandum. They argued that the Complaint filed in the Third District Court, serving as the basis for plaintiffs' claims, is covered by judicial privilege and absolutely bars plaintiffs' libel claims. In the interest of fairness, the Court, in an Order signed May 7,

2004, allowed the Pratts eight days[1] from the signing of the Order (the Pratts' supplemental memorandum was due by May 19, 2004) to respond solely to defendants' argument regarding judicial privilege. The Pratts failed to respond within eight days, and instead filed their supplemental memorandum almost one month after the due date, on June 17, 2004.

On May 5, 2004, the Pratts filed an amended Complaint.

On June 23, 2004, defendants filed their Motion to Strike the Pratts' late supplemental memorandum. On July 16, 2004, the Pratts' filed their opposition to defendant's Motion to Strike. The Pratts also filed their own Motion to Strike on July 16, 2004, arguing that defendants' judicial privilege argument was improper and should be stricken.

In the Hansen matter, defendants filed a Motion to Dismiss May 4, 2004. The Hansens were served with the Motion and failed to respond within the ten day period allowed by Rule 7 of the Utah Rules of Civil Procedure. On June 23, 2004, defendants filed their Request to Submit their Motion to Dismiss. Also, on June 23, 2004, the Hansens filed their Objection to the Request to Submit, arguing that they did respond to the Motion to Dismiss by filing a Motion to Consolidate their action with the Pratts'.

ANALYSIS

Motion to Consolidate

Rule 42 of the Utah Rules of Civil Procedure governs consolidation. It states in part: "When actions involving a common question of law or fact are pending before the court, it may

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[1] Rule 7 allows the moving party five days after the service of the memo in opposition to file their reply; the Court allowed the Pratts the same five days to reply to the judicial privilege argument plus an additional three days. As this time period was less than ten days, the eight-day period did not include Saturdays or Sundays.

order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; . . . ." Rule 42(a)(1) says: "A motion to consolidate cases shall be heard by the judge assigned to the first case filed."

The Pratts filed their Motion to Consolidate their matter with the Hansen's before this Court, arguing that both actions involved common questions of law or fact. Defendants' failed to respond to the Motion and the time for response is passed. The Court, therefore, grants the Pratts Motion to Consolidate. As both the Hansen and Pratt matters are now consolidated, "the case number of the first case filed shall be used for all subsequent papers . . . ." *Utah R.Civ.P.* 42(a)(2).

Defendants' Motion to Strike Plaintiff Pratt's Supplemental Memorandum

Defendants argued for the first time in their Reply to the Pratts' objection that judicial privilege precluded the Pratts' defamation claims. The Court gave the Pratts ample time–eight days–to file a supplemental memo giving a limited response to the "judicial privilege" argument. The Pratts ignored the Court's Order and merely filed their memo one month late, giving no reason for their late delay. Their supplemental memorandum was therefore an unauthorized memorandum and per Rule 7(c)(1) will not be considered; the Pratts' supplemental memo is hereby stricken.

The Pratts Motion to Strike Defendants' "Judicial Privilege" Argument

Having ignored the Court's order allowing them time to respond to the "judicial privilege" argument, the Pratts now complain that the argument raised by defendants for the first time in their Reply, was improper as it deprived the Pratts of the chance to respond to the

argument. The Pratts also argue that if the Court strikes plaintiff's memo addressing judicial privilege, the Court should also strike defendants' judicial privilege argument from the Reply Memorandum.

The Court will not strike defendants' "judicial privilege" argument. Because the Court recognized that the Pratts' did not have opportunity to respond to the "judicial privilege" argument, the Court allowed the Pratts leave to file a supplemental memo within eight days. The Pratts chose to not comply with the Court's Order giving them opportunity to respond to the argument and the Court will not now penalize defendants for the Pratts' tardiness. The Pratts are solely to blame for their own late filings and cannot complain of unfairness. Their Motion to Strike is denied.

Plaintiff Hansens' Motion to Strike Defendants' Request to Submit

Rule 7(c)(1) allows a party ten days to respond to a Motion, in this case, defendants' Motion to Dismiss. The Hansens' failed to oppose defendants' motion filed May 4, 2004. They filed no opposition to the Motion nor did they give any reason for not responding. On June 23, 2004, well past the ten-day period allowed for the Hansens' response, defendants' filed their Request to Submit, requesting the Court dismiss the Hansens' claims without prejudice. Also on June 23, 2004, the Hansens filed their Motion to Strike defendants' Request to Submit. They argued that they did respond to the Motion to Dismiss by filing a Motion to Consolidate. They further argued that the Motion to Consolidate was granted and that defendants' Motion to Dismiss was rendered moot by the consolidation. The Hansen's provided no case law or other authority for their arguments.

Rule 7(c)(1) is clear: "a party opposing the motion shall file a memorandum in opposition" within ten days. The Hansens filed no such memo in opposition to defendants' Motion to Dismiss. There is no basis in Rule 7 for their contention that their Motion to Consolidate served as a response to defendants' Motion to Dismiss or that the granting of the Motion to Consolidate mooted defendants' Motion to Dismiss. The Hansens failed to follow the mandates of Rule 7; their time had passed for filing their opposition memo and the briefing was therefore complete. Once the briefing was complete, defendants could file their request to submit. Defendants' Request to Sumbit will not be stricken and the Hansen's Motion is denied.

Defendants' Motion to Dismiss Plaintiff Hansens' Action

Defendants properly filed the requirements of Rule 7(d) and there being no opposition to their Motion to Dismiss, the Court accordingly grants their Motion to Dismiss the Hansens' complaint without prejudice.

Defendants' Motion for Summary Judgment as to the Pratts' claims

Defendants' originally filed a Motion to Dismiss, but matters outside of the pleadings were presented to the Court, i.e. the Affidavit. Rule 12(b) states:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

The Court did not exclude the Affidavit and gave the parties reasonable opportunity to present all material made pertinent to the motion. Specifically, the Court issued an Order on

April 12, 2004 allowing all parties to submit additional materials, i.e. affidavits. If the Pratts had desired to file any opposing affidavits, they could have so done; they did not. Having accorded both parties the chance to submit additional affidavits before converting the 12(b)(6) Motion to one for judgment as a matter of law, the Court will now treat defendants' Motion as one for summary judgment.

A party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact . . . ." *Utah R. Civ. P.* 56(c). Additionally, when a summary judgment motion is made and supported as provided for under Rule 56, "an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment . . . shall be entered." *Utah R. Civ. P.* 56(e); *see also Home Builders Ass'n. v. City of N. Logan*, 1999 UT 63, 983 P.2d 561. The Pratts claim defendants published both libelous and slanderous statements about them in the August 2003 news conference. They also made two claims against defendants for invasion of privacy, one claim of civil conspiracy, and prayed for monetary and injunctive relief. The Court will address each claim individually.

Libel

The Pratts continually referred, in their Complaint and in their pleadings, to "libelous documents" or to a "libelous document" but never specifically identified the nature of the alleged libelous documents. Nelson's attorney submitted an affidavit with attached exhibits which for

the first time identified the allegedly libelous documents, which were merely a copy of the complaint and a copy of Nelson's press conference statement. The Court will first address the Pratts' claims regarding the complaint and then their claims regarding distributed copies of Nelson's statement to the press.

As to Nelson's complaint filed in Third District Court, regardless of the statements contained in it, the Court holds that the doctrine of judicial privilege acts as an absolute bar to the Pratts' claim of defamation arising from allegations made in that complaint. "The general rule is that judges, jurors, witnesses, litigants, and counsel involved in a judicial proceeding have an absolute privilege against suits alleging defamation." *Krouse v. Bower*, 2001 UT 28, ¶¶ 8, 20 P.3d 895. That privilege covers "all pleadings and affidavits necessary to set the judicial machinery in motion." *DeBry v. Godbe*, 1999 UT 111, ¶¶ 12, 992 P.2d 979; *see also Bennett v. Jones, Waldo, Holbrook & McDonough*, 2003 UT 9, ¶¶ 77, 70 P.3d 17 (citing to *Janklow v. Keller*, 241 N.W.2d 364, 367-70 (S.D. 1976) (holding that plaintiff's claims arising from complaints filed by defendant law firm and alleging that the complaints were filed to injure plaintiff and mislead the courts were absolutely barred by judicial proceeding privilege). Nelson's complaint was filed to set the judicial process in motion and even if she had made certain defamatory statements in the complaint, the Pratts could not maintain a cause of action for defamation based solely on statements within that complaint.

The Court also finds that the distribution of copies of the complaint did not destroy the privilege. *See DeBry v. Godbe*, 1999 UT 111 at ¶¶ 21 (holding that "communications that are otherwise privileged lose their privilege if the statement is excessively published . . . ."). The

complaint was a matter of public record that named over 300 defendants. *See Utah Code Ann.* §§ 63-2-103 (18)-(19), *Utah Code Ann.* §§ 63-2-201 (1)-(2). Defendants did not excessively publish that which could have already been accessed or copied by any person attending the press conference. As a matter of law, defendants cannot be held liable for defamation for making allegedly defamatory statements in the complaint and then distributing copies of the complaint.

The Court also holds that statements contained in the copies of Nelson's statement distributed to some members of the press are not defamatory as a matter of law. When dealing with defamation on a motion for summary judgment, the court, as a matter of law, first decides whether the allegedly defamatory statements could be interpreted by a reasonable jury to be susceptible of a libelous meaning. *Kelly v. Schmidberger*, 806 F.2d 44, 47 (2d Cir. 1986). In order to be considered a libelous meaning, however, the party complaining of the statement must first show the statement refers to them. *Lynch v. Standard Publ'g Co.*, 170 P.2d 770, 773 (Utah 1918). Nothing in Nelson's distributed statement ever directly mentions the Pratts, nor could any of the extrinsic facts and circumstances show that the statement was intended to specifically refer to the Pratts. Nelson's statements referred to the Pratts only generally as part of a larger group of about 389 named defendants and 1000 unnamed defendants. The language in the statements distributed to the press mention refer only to large groups, i.e. the "Kingston Family Organization", "leaders of the Kingston organization", and "the people that we are bringing this lawsuit against." Our Supreme Court has stated that where the allegedly libelous material "'has no special application and is so general that no individual damages can be presumed, and the class referred to is so numerous that great vexation and oppression might grow out of a

multiplicity of suits, no private suit can be maintained.'" *Lynch*, 170 P.2d at 774 (quoting 25 Cyc. 363); *see also Fenstermaker v. Tribune Pub. Co.*, 43 P.112, 114 (Utah 1895) (*"Fenstermaker I"*).

Our high court, however, also stated that where the words refer only to a class of individuals, yet can be interpreted as referring to an individual or limited individuals, that person or those persons can maintain an action for libel. *Id.* at 773. This would seem to indicate a factual issue, improper for the Court to decide at this point. The Court finds, however, that given the language in the press statement, no reasonable jury could interpret those words to refer to the Pratts directly. There was nothing in the statement or in the circumstances in which it was made, that would lead a reasonable jury to believe that Nelson intended to direct her words to the Pratts only and not refer to the larger group of almost 400 named defendants. In fact, Nelson stated that her action was commenced to ensure that the "people we are bringing this lawsuit against" stop what she claims are harmful and illegal acts, not just to stop allegedly illegal acts the Pratts are committing or committed.

The Pratts, in arguments supporting their claims, quoted language from *Fenstermaker v. Tribune Pub. Co*, 45 P.1097, 1098 (Utah 1896) (*"Fenstermaker II"*) –making certain alterations, and argued that *Fenstermaker II* states that, "one who publishes matter about a [group] in its collective capacity assumes the risk of its being libelous as to any member thereof. Any other rule . . . would permit indiscriminating reference to the deed of a single member of the [group] as the deed of all collectively . . . ." *Fenstermaker II*, however, uses the word "family" and not "group" which changes the entire meaning of the statement. A family is much smaller than the

group of 389 named defendants of which the Pratts are a part. In fact, *Fenstermaker II*, involved only statements about a family living on a ranch, not a group of 389 defendants. Also, in *Fenstermaker I*, the court clearly stated that had a defamatory statement been made charging the citizens of the county with the same reprehensible conduct as the Fenstermakers, and had some county residents complained of defamation, "the class so charged would be so extensive, the impossibility of fixing individual responsibility so apparent, that the court would pronounce the [statement] not actionable." The Pratts are among only a larger group of people against whom allegedly libelous publications were made. As such, no reasonable jury could interpret the statement to refer to them specifically and defendants are entitled to judgment as a matter of law on this point.

Additionally, the Court cannot say unequivocally that the press statement is not covered by the judicial proceeding privilege. The privilege covers not just complaints, but is interpreted broadly, *DeBry v. Godbe*, 1999 UT 111 at ¶¶ 14, and covers statements made by litigants and their attorneys preliminary to proposed judicial proceedings. *Krouse v. Bower*, 2001 UT 28 at ¶¶9. To establish this privilege, the statement must be "(1) 'made during or in the course of a judicial proceeding'; (2) "have some reference to the subject matter of the proceeding'; and (3) be 'made by someone acting in the capacity of judge, juror, witness, litigant, or counsel.'" *DeBry v. Godbe*, 1999 UT 111 at ¶¶ 11 (quoting *Price v. Armor*, 949 P.2d 1251, 1256 (Utah 1997). The first prong is met as the statement was made during a judicial proceeding, at least once the complaint had been filed; even if the complaint had not yet been filed, the privilege would still cover statements made preliminary to filing the complaint. The statement made

reference to the subject matter, i.e. it stated the purpose of Nelson's complaint and what she hoped to gain from the filing. Finally, the statement was made by a litigant, Nelson herself. Arguably, the statement could be protected by judicial privilege and therefore would bar the Pratts claims.

Slander and False Light/Invasion of Privacy

The Court will analyze the Pratt's slander and false light/invasion of privacy claims together as "[a] false light claim is 'closely allied' with an action for defamation, and 'the same considerations apply to each.'" *Stein v. Marriott Ownership Resorts, Inc.*, 944 P.2d 374, 380 (Utah 1997) (quoting *Cibenko v. Worth Pub's, Inc.*, 510 F.Supp. 761, 766-67 (D.N.J. 1981). Before analyzing the merits of the Pratts' claims, the Court first addresses arguments presented by defendants concerning the adequacy of the Pratts' pleadings.

Defendants argue that the Pratts fails to identify specifically which statements they claims are defamatory. Defendants argue that the pleadings must identify on their face which statements are allegedly defamatory, i.e reproduce, verbatim, statements which are defamatory, in order to allow the court to determine whether the statements can be considered defamatory and to allow the defendant to mount a proper defense. Defendants properly cite to several Utah cases dealing with defamation where in each case, the party complaining of defamation set forth the defamatory statements verbatim.

The Pratts also correctly cite to federal law determining the sufficiency of defamation claims in light of Rule 8(a) and Rule 9 of the Federal Rules of Civil Procedure, which rules contain federal pleading requirements and are practically identical to Utah's pleading rules. The

federal case law states that the rules impose no special pleading requirements on defamation as is imposed on claims of fraud, misrepresentation, mistake, etc. Additionally, some federal opinions hold that complaints which have not set forth verbatim the allegedly defamatory statements have been held sufficient. Given the liberality of our states notice pleading statutes, the Pratts argue, the only requirement placed on pleading defamation is that they set forth a short and plain statement giving the nature and basis of the claim asserted–which they say they did.

Though some federal courts might determine that a defamation claim is sufficient without stating verbatim the allegedly defamatory language, it seems clear that in Utah, a mere statement that a party made "defamatory communications", distributed "libelous documents," or made publications which placed a party in a false light is insufficient to meet the standards of even Rule 8(a). *See Williams v. State Farm Ins. Co.*, 656 P.2d 966, 971 (Utah 1982). The *Williams* court recognized that although our liberalized pleading rules allow parties to present whatever legitimate contentions they have, "an allegation of 'certain derogatory and libelous statements' is insufficient; a complaint for defamation must set forth 'the language complained of . . . in *words* or *words* to that effect . . . ." *Williams*, 656 P.2d at 971 (quoting *Dennett v. Smith*, 445 P.2d 983, 984 (Utah 1968)) (emphasis in original). The only specific language that could be considered "words to [the] effect" of being defamatory, are words contained in Nelson's Third District complaint and which the Pratts merely restate in their own Complaint. The Pratts refer only vaguely to the slanderous statements as "defamatory communications." The Pratts' Complaint set forth no other defamatory words verbatim or words to that effect which would show which

statements made by Nelson at the press conference were slanderous or placed them in a false light.

Given that the Pratts have set forth no specific defamatory language, the Court must look to the affidavits, not merely pleadings, to determine what was actually said. William Mark's Affidavit affirmed that the statement read at the press conference contained no specific references to the Pratt's; he stated that this was the only statement read by Nelson. The Pratts' have merely rested on their pleadings when alleging the defamatory matter and have set forth no affidavit which would dispute what William Mark affirms was the only statement made by Nelson at the press conference. There being no factual dispute as to what Nelson said, the Court finds that no reasonable jury could interpret what she did say as slanderous or as placing the Pratts in a false light.

Even if the statement was slanderous, the statement does not slander the Pratts directly nor does it place them in a false light for essentially the same reason that Nelson did not libel plaintiff: no reasonable jury could interpret those statements as *concerning* the Pratts directly. The allegedly slanderous statements only refer to the Pratts as part of a larger of group of hundreds of defendants. They being only part of a larger group, they cannot maintain a cause of action for slander or for false light/invasion of privacy as the slanderous material "'has no special application'" to the Pratts "'and is so general that no individual damages can be presumed, and the class referred to is so numerous that great vexation and oppression might grow out of a

multiplicity of suits.'" *Lynch*, 170 P.2d at 774 (quoting 25 Cyc. 363). The Pratts slander and false light/invasion of privacy claims cannot be maintained.[2]

Civil Conspiracy Claim

The Pratts' pleadings as to civil conspiracy are again vague. They seemingly allege that defendants either conspired to file a complaint filled with defamatory statements, or conspired to hold a press conference where they would defame the Pratts. The Court has already held that defendants did not slander the Pratts in the press conference; therefore, that press conference cannot serve as a basis for a claim of civil conspiracy. As to the complaint, the filing of a complaint is a lawful act. Even if there was a conspiracy to file a complaint that contained defamatory statements, and where the complaint's content would be privileged, it is unlikely that would be actionable. "If the object of the alleged conspiracy or the means used to attain it is lawful, even if damages result to the plaintiff or the defendant acted with malicious motive, there can be no civil action for conspiracy." *Peterson v. Delta Air Lines, Inc.*, 2002 UT App 56, ¶¶ 12, 42 P.3d 1253. Defendants are entitled to judgment as a matter of law on this point as well.

Dated August 17, 2004.

DISTRICT COURT JUDGE
MICHAEL G. ALLPHIN

[2] Additionally, the Court believes that the judicial proceeding privilege analysis might well apply here and bar the slander and invasion of privacy claims.

MAILING CERTIFICATE

I certify that I sent a true and correct copy of the foregoing RULINGS, postage pre-paid on August 17th, 2004, to the following:

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